

ABANDONMENT, COPYRIGHT AND ORPHANED WORKS: WHAT DOES IT MEAN TO TAKE THE PROPRIETARY NATURE OF INTELLECTUAL PROPERTY RIGHTS SERIOUSLY?

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[For many years there was doubt as to whether personal property could be abandoned. In more recent times, however, the existence of a doctrine of abandonment has been solidifying in relation to chattels. In this article the authors suggest that copyright works can also be abandoned. This conclusion has significant implications for cultural institutions and other users struggling to deal with so-called 'orphaned works'. More generally, the authors suggest that recognising that abandonment of copyright is possible has repercussions for how we think about intellectual property rights and, in particular, should cause us to look more closely at other doctrines within the law of personal property that might limit intellectual property's reach.]

CONTENTS

I	Introduction	971
II	Abandonment	974
	A Abandonment and Choses in Possession	974
	B Abandonment and Copyright	982
	C Objections to Abandonment of Copyright	987
	1 Johnson's Objections	987
	2 Other Objections	991
III	Determining Abandonment and Its Application to Orphaned Works	996
IV	Conclusion: Propertising Intellectual Property	1003

I INTRODUCTION

Intellectual property has become a highly controversial and politicised topic, with recent expansions of its boundaries being met with fierce criticism. The resulting disagreements have been played out by reference to economics, moral philosophy, and theories of authorship and scientific innovation. In addition, however, there has been a linguistic component to these debates, one that has revolved around the question of whether intellectual 'property' rights are really a species of property at all. Advocates of expansive rights frequently insist that the

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proprietary nature of intellectual property needs to be afforded respect.¹ Conversely, one complaint that is commonly voiced by those who believe that intellectual property rights often overreach is that uncritical acceptance of the rubric of property has facilitated the expansion of intellectual property's domain.² In these debates one finds an echo of arguments over language that can be traced back to the mid 19th century and before. There was, for example, a linguistic dimension to arguments over copyright term extension in the 1830s and '40s in the United Kingdom ('UK'), with opponents of term extension preferring the language of 'monopoly' to that of 'property' when describing copyright.³

This article does not seek to answer the question of whether copyright and other forms of intellectual property can fairly be described as property. This question has been endlessly debated and it is doubtful whether anything less than a book-length study could add meaningfully to the existing literature. Still more importantly, however, we are of the view that this debate is in danger of missing the point. We are positioned amongst those who believe that intellectual property rights often overreach. Many of this group are quick to insist that the property label is inapt, and argue that to concede the label of property is to give ground without a fight to those who wish to see the law's boundaries expanded. But to our mind this position is both unwise and ultimately unconvincing. It is unwise because, for better or for worse, the idea that intellectual property rights are a species of property is one that has become firmly embedded in legal, political and (to some degree) public discourse.⁴ As a consequence, to insist that intellec-

¹ See, eg, A A Keyes and C Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Consumer and Corporate Affairs Canada, 1977) 146 (likening library copying and supply of material without consent to 'using someone else's property without paying for that property'); House of Commons Sub-Committee of the Standing Committee on Communications and Culture on the Revision of Copyright, Parliament of Canada, *A Charter of Rights for Creators* (1985) 9 (resisting calls for fair use to be introduced into the Canadian *Copyright Act*, RSC 1985, c C-42, because it would imply 'that rights in intellectual property are definitely second class rights, very different from rights in physical property'); Jack Valenti, 'Don't Be a Scene Stealer' (2003) 11 *CommLaw Conspectus* 307, 309 (asking why students who would not steal a DVD from a store will download unauthorised content from the internet).

² See, eg, Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth Publishing, 1996) 210–13 (attacking proprietarianism); Carys J Craig, 'Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law' (2002) 28 *Queen's Law Journal* 1, 57 (arguing that '[t]he powerful and mesmerizing badge of "property" ... takes over our understanding and distorts our policy decisions'); Lawrence Lessig, 'The Creative Commons' (2003) 55 *Florida Law Review* 763, 775–6 (stating that 'property talk' has led to confusion in debates about copyright and intellectual property); Margaret Ann Wilkinson, 'Battleground between New and Old Orders: Control Conflicts between Copyright and Personal Data Protection' in Ysolde Gendreau (ed), *An Emerging Intellectual Property Paradigm — Perspectives from Canada* (Edward Elgar, 2008) 227, 237–41 (arguing that equating copyright with property is inaccurate, leads to a mischaracterisation of rights and obscures the importance of public interest values within the law).

³ See Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge University Press, 1999) 65.

⁴ For instance, s 196(1) of the *Copyright Act 1968* (Cth) describes copyright as 'personal property' that 'is transmissible by assignment, by will and by devolution by operation of law.' For discussion of the metaphors that surround copyright, many of which draw from the language of physical property, see, eg, Patricia Loughlan, 'Pirates, Parasites, Reapers, Sowers, Fruits, Foxes ... The Metaphors of Intellectual Property' (2006) 28 *Sydney Law Review* 211.

tual property rights are not proprietary can appear unworldly and is to put oneself on the wrong side of a widely shared understanding. It is unconvincing because the set of legally protected interests that we now group under the banner of ‘intellectual property’ have long been regarded as proprietary in nature — in the case of copyright the argument over language had almost certainly been lost by the 1830s⁵ — and it seems odd to suggest that it is only now that notions of property have helped ease the acceptance of stronger rights. This suggests that something else is going on, perhaps related to how the rhetoric of property is used in debates about the reach of intellectual property. Once this broader context is taken into account, we believe there are serious problems with the proposition that if we take seriously the idea that intellectual property is *property*, we will inevitably end up with more expansive rights.⁶

To our mind, therefore, the problem lies not in the property tag per se, but rather in the particular understanding of property that has become embedded in debates over the proper scope of intellectual property rights. Both advocates and opponents of stronger rights frequently approach property as providing a ‘despotic dominion’ that confers a set of strong and immutable rights on the owner.⁷ In contrast, we want to suggest that if calls to respect the proprietary status of intellectual property rights are understood to be synonymous with a call for more expansive rights, then this reflects a misunderstanding of the nature of property rights and how they are exploited, transferred and destroyed.⁸ In this article we focus on the doctrine of abandonment and what such a mechanism for losing rights would mean for the law of copyright. This is part of a broader project in which we argue that we can and should look to chattel property to learn how limits on intellectual property rights might be crafted.

We suggest that the general law of abandonment can be applied in such a way as to remove copyright protection from some types of works without compromising the integrity of either the copyright system or the rules on abandonment. This conclusion has important implications in the case of works that have been dedicated to the public domain. However, we go further and argue that the

⁵ It is notable, for example, that debates over copyright in the 18th century were framed in terms of literary *property*: see, eg, Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993) ch 4.

⁶ A similar point has been made by others: see, eg, Justin Hughes, ‘Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson’ (2006) 79 *Southern California Law Review* 993; Lionel Bently, ‘From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property’ in Graeme B Dinwoodie and Mark D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 3.

⁷ This language is taken from Blackstone: William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 5th ed, 1773) vol 2, 2 (describing property as ‘that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe’).

⁸ For similar arguments, see, eg, Michael A Carrier, ‘Cabining Intellectual Property through a Property Paradigm’ (2004) 54 *Duke Law Journal* 1 (conducting a systematic analysis of property law doctrines to argue that the propertisation of intellectual property suggests the recognition of new and more robust defences); Helena R Howe, ‘Copyright Limitations and the Stewardship Model of Property’ [2011] *Intellectual Property Quarterly* 183 (observing that arguments for stronger rights in the copyright sphere that rely on an analogy with land rest on a controversial understanding of what it means to own land).

doctrine of abandonment can also be applied in other circumstances, including in relation to some categories of ‘orphaned works’ (that is, copyright works for which it is not possible to identify or locate the owner). Admittedly, an application of the law of abandonment would not solve the orphaned works problem.⁹ Nevertheless, it would confer both direct and indirect benefits on many users of copyright works, including institutional users such as libraries, archives and museums. Still more importantly, acceptance that abandonment of copyright is possible might allow us to look more creatively at how other doctrines within the law of personal property might be used to limit the reach of intellectual property rights, and we may come to recognise that some of the problems created by intellectual property’s overexpansion would be mitigated if we are prepared to accept that intellectual property rights should be afforded similar treatment to other forms of personal property. In this way, this article aims to shift the debate away from the binary ‘property/not property’ debate about the nature of intellectual property rights in order to focus on what we believe to be a more nuanced and ultimately more fruitful question — namely, what does it mean to take the proprietary nature of intellectual property rights seriously?

As a final introductory point we should note that our focus is on the legal position in Australia, but in developing our argument we draw on sources both from elsewhere within the British Commonwealth and from further afield.

II ABANDONMENT

A *Abandonment and Choses in Possession*

It is uncontroversial that we can lose rights by intentionally transferring them to someone else. For instance, we can sell or give away a chattel, and we can assign rights in copyright works and other forms of intellectual property. More controversial is the question of whether we can lose rights by voluntarily and irrevocably relinquishing them in the absence of a recipient. Such a mechanism is commonly referred to as abandonment.

In the 1920s, the Tasmanian case *Johnstone & Wilmot Pty Ltd v Kaine* (‘*Johnstone & Wilmot*’) held that the intentional abandonment of a broken-down motor truck did not divest the owner of his rights, and that a finder of abandoned property is in the same position as a finder of lost property (ie his or her title is susceptible to a claim by the owner).¹⁰ In reaching this conclusion, Clark J quoted from Oliver Wendell Holmes that the common law ‘abhors the absence of

⁹ The question of how to deal with orphaned material has been a challenge within copyright law for many years: see, eg, Stephen Breyer, ‘The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs’ (1970) 84 *Harvard Law Review* 281, 326. However, the issue has become increasingly prominent in recent years: see, eg, United States Copyright Office, *Report on Orphan Works: A Report of the Register of Copyrights* (2006); Andrew Gowers, *Gowers Review of Intellectual Property* (2006) 69–72 [4.91]–[4.101]; Ian McDonald, ‘Some Thoughts on Orphan Works’ (2006) 24 *Copyright Reporter* 152.

¹⁰ (1928) 23 Tas LR 43, 56–8 (Clark J).

proprietary or possessory rights as a kind of vacuum'.¹¹ It is notable, however, that the authorities cited by Clark J in the course of his judgment were mixed. Although one case did indicate that an owner cannot relinquish property in goods unless those rights are vested in another,¹² others — particularly those dealing with treasure trove and wrecks — supported the existence of a doctrine of abandonment.¹³

More recent Australian authority is much more supportive of the view that abandonment is possible. There does not appear to be any recent case that supports the approach adopted in *Johnstone & Wilmot*. Some judges have equivocated and not come to any firm conclusion about whether abandonment is legally possible.¹⁴ In these cases such an approach has not generally impacted on the end result, for instance because the facts did not disclose any abandonment even if it were accepted as a mechanism to lose rights. In contrast, other authority has held that abandonment of goods is possible and that a finder who subsequently brings that chattel into his or her possession will thereby obtain good title.¹⁵ This proposition was explored in detail in the Queensland case *Re Jigrose Pty Ltd* ('*Re Jigrose*').¹⁶ The applicant had sold farmland to the respondents. The contract of sale utilised standard conditions of sale, including a clause under which: (1) any property not sold under the contract would be removed from the land before the respondents took possession; and (2) any such property not removed would be deemed to be abandoned, and the respondents could dispose of that property in any manner they thought fit. The applicant left \$20 000 worth of hay on the land. The respondents would not allow the applicant onto the land to collect it. The applicant argued that the clause did not allow the purchasers to appropriate the property to themselves, but this argument was not successful. Kiefel J held:

But what if the owner has really proclaimed to the world at large that he or she has no interest in the chattels, desires neither possession nor ownership and will

¹¹ Ibid 56, quoting Oliver Wendell Holmes Jr, *The Common Law* (Little, Brown and Co, 1881) 237. In this section of his magnum opus, Holmes was trying to explain the common law's approach to possession and, in particular, the law's reluctance to accept that possessory rights can be lost involuntarily. To conclude from this statement that Holmes was antithetical to a doctrine of abandonment is therefore deeply problematic. In contrast, the view that Holmes' understanding of the nature of property can be reconciled with a doctrine of abandonment receives strong support in Kiefel J's judgment in *Re Jigrose Pty Ltd* [1994] 1 Qd R 382, 386: see below n 16 and accompanying text.

¹² *Johnstone & Wilmot* (1928) 23 Tas LR 43, 56 (Clark J), citing *Haynes's Case* (1614) 12 Co Rep 113; 77 ER 1389.

¹³ *Johnstone & Wilmot* (1928) 23 Tas LR 43, 57–8 (Clark J), citing *A-G v Trustees of the British Museum* [1903] 2 Ch 598, 608–9 (Farwell J); *Brown v Mallett* (1848) 5 CB 599; 136 ER 1013; *White v Crisp* (1854) 10 Ex 312; 156 ER 463; *Arrow Shipping Co Ltd v Tyne Improvement Commissioners; The Crystal* [1894] AC 508, 521 (Lord Watson), 532 (Lord Macnaghten); *The Tubantia* [1924] P 78.

¹⁴ See, eg, *Moorhouse v Angus and Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700, 702 (Hutley JA), 706–7 (Samuels JA); *Cook v Saroukos* (1989) 97 FLR 33, 41 (Angel J); *New Style Furniture Sales Pty Ltd v Deputy Commissioner of Taxation* (1998) 39 ATR 453, 464 (Hill J); *Makucha v Preslands Finance* [2005] NSWSC 41 (8 February 2005) [17]–[18] (Campbell J).

¹⁵ See, eg, *Lang v Le Boursicot* (1993) 5 BPR 11 782, 11 787–8 (McLelland J); *Keene v Carter* (1994) 12 WAR 20, 24–5 (Ipp J).

¹⁶ [1994] 1 Qd R 382.

not attempt to reclaim them? ... It seems to me that if I do not wish to retain the possession or property in goods (perhaps most clearly shown by throwing them away), there is no reason in principle why the common law would require me to remain owner. The common law is usually concerned to exclude others from interfering with a person's interest in property, that interest in turn being one to exclude others: see Holmes, *The Common Law*, (1881), 220. If a person no longer holds that interest it is difficult to see what the common law's concern could be.¹⁷

That abandonment is possible has also been accepted in cases handed down in other Commonwealth jurisdictions. For example, one finds comments to this effect in the Canadian cases *Simpson v Gowers*¹⁸ and *Wicks Estate v Harnett*.¹⁹ Still more recent is the English High Court case *Robot Arenas Ltd v Waterfield* ('*Robot Arenas*').²⁰ The claimants alleged that the defendants had intentionally destroyed the set from the well-known British game show *Robot Wars*. The set had been purchased by the claimants and was being stored, pursuant to a licence agreement, in premises on a former Royal Air Force base. The defendants purchased the base on terms under which the premises containing the set were sold with vacant possession. The evidence as accepted by Mr Edelman QC (sitting as a Deputy High Court Judge) was that the claimants had in fact removed most of the set but had left behind some equipment.²¹ The defendants contacted the former owners of the base in relation to material they found and asked that it be removed by a certain date; when that day arrived and they had heard nothing, they had the equipment removed and scrapped. The claimants alleged that such destruction was wrongful and claimed damages.

Significantly, in *Robot Arenas* the legal status of abandonment in English law was regarded as uncontroversial. Mr Edelman QC quoted from *Palmer on Bailment*, in which Norman Palmer distinguished between what he termed the 'colloquial' understanding of the word 'abandon' (where a person gives up a search for a lost object, but 'does not resign any proprietary or possessory claims') from the 'juristic' sense of the word (where a person casts a chattel away 'with the intention of divesting himself not only of possession but also of ownership').²² Legally, ownership is retained in the former scenario but not the latter. Mr Edelman QC then quoted the concluding remarks of Palmer, which neither side had sought to challenge:

Despite some surviving doubt, the better opinion appears to be that divesting abandonment is a defence to conversion provided that a party entitled to do so

¹⁷ Ibid 386, citing Holmes, above n 11, 220.

¹⁸ (1981) 121 DLR (3d) 709 (Ontario Court of Appeal).

¹⁹ (2007) 48 CCLT (3d) 155 (Ontario Superior Court of Justice).

²⁰ [2010] EWHC 115 (QB) (8 February 2010).

²¹ Ibid [87]. This turned out to be a crucial aspect of the case as it went to the nature and value of what had been left behind and hence the reasonableness of the defendants' actions (explained in below n 24). The position of the claimants was that the entire set had remained in situ whilst the defendants' evidence was that they only found some miscellaneous equipment when they took possession.

²² Ibid [13], quoting Norman Palmer, *Palmer on Bailment* (Sweet & Maxwell, 3rd ed, 2009) 1404 [26-021] ('*Palmer on Bailment*').

has renounced possession and the immediate right to possession of the chattels in question.²³

As it turned out, there was no abandonment in this case as the claimants had not intended to abandon their property, although the circumstances in which the equipment had been left were nevertheless central to the defendants prevailing on a separate but related defence.²⁴ *Robot Arenas* is therefore an important addition to the recent trend in modern authorities to recognise a doctrine of abandonment.

In light of cases such as *Re Jigrose* and *Robot Arenas*, and taking account of the fact that there has long been authority to this effect, the best view appears to be that abandonment of ownership is possible and arises in cases where an owner discards property with the intention of forgoing any future claim to it.²⁵ To the extent that this proposition remains controversial, it is worth adding that a number of prominent commentators have also taken this position over recent years. In addition to Palmer, quoted above, the view that abandonment is possible is also the position taken by Simon Fisher²⁶ and Anthony Hudson,²⁷ and is the view that Michael Bridge²⁸ and Andrew Bell²⁹ prefer. Support also comes from earlier authors whose treatments of personal property proceeded on the assumption that abandonment is a mechanism for divesting owners of their rights.³⁰ That chattel property can be abandoned is also well-established in the United States ('US')³¹ and Germany.³²

²³ *Robot Arenas* [2010] EWHC 115 (QB) (8 February 2010) [14], quoting *Palmer on Bailment*, above n 22, 1410 [26-030].

²⁴ Mr Edelman QC held that a so-called 'unconscious bailee' who does not know whether goods belong to a third party will have a defence to an action brought in conversion where destruction of the goods was reasonable in the circumstances: *Robot Arenas* [2010] EWHC 115 (QB) (8 February 2010) [15]–[23]. The defendants in this case were successful as the actions they took to locate the owners, combined with the nature and location of the goods left behind, were held to support their conclusion that 'there was no one who was interested in the goods': at [96]. This would seem to suggest that even though the defendants were wrong in their conclusion that the goods had been abandoned, the reasonableness of their actions conferred an exception on the usual rule of strict liability in conversion. This aspect of the case has been viewed as controversial: for discussion, see, eg, Lee Aitken, 'Abandonment of a Chattel, and the Unwitting Bailee: Position in *Robot Arenas Ltd* [2010] EWHC 115 (QB)' (2010) 84 *Australian Law Journal* 369. To our mind, however, it appears consistent with the reasoning of some earlier cases dealing with the liability of unconscious and involuntary bailees, such as *Lethbridge v Phillips* (1819) 2 Stark 544; 171 ER 731 and *Elvin & Powell Ltd v Plummer Roddis Ltd* (1933) 50 TLR 158.

²⁵ As will be seen in below Part III, 'intention' in this context is to be judged objectively.

²⁶ Simon Fisher, *Commercial and Personal Property Law* (Butterworths, 1997) 127 [4.58].

²⁷ Anthony Hudson, 'Abandonment' in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (LLP, 2nd ed, 1998) 595.

²⁸ M G Bridge, *Personal Property Law* (Oxford University Press, 3rd ed, 2002) 22–3.

²⁹ Andrew P Bell, *Modern Law of Personal Property in England and Ireland* (Butterworths, 1989) 51–3. Insofar as other commentators have not been prepared to reach the same conclusion they have, at most, tended to treat the matter as one that is undecided: see, eg, Robin Hickey, *Property and the Law of Finders* (Hart Publishing, 2010) 68.

³⁰ See, eg, T Cyprian Williams, *Principles of the Law of Personal Property* (Sweet & Maxwell, 18th ed, 1926) 26 (stating that 'it appears that the ownership of goods may be ended by their abandonment', and citing in support *Arrow Shipping Co Ltd v Tyne Improvement Commissioners; The Crystal* [1894] AC 508, 532 (Lord Macnaghten) and *The Tubantia* [1924] P 78, 87 (Duke P)); R H Kersley, *Goode's Modern Law of Personal Property* (Sweet & Maxwell, 9th ed,

There is also a good conceptual case for allowing property rights to be abandoned. For example, insofar as one takes the view that the institution of property is bound up with issues of personhood and autonomy, it seems obvious that it should be possible to divest oneself of property without having to find a third party to whom it can be transferred. It is therefore unsurprising that Hegel took the view that property should be capable of abandonment.³³ As James Penner has put it:

One ought not to be saddled with a relationship to a thing that one does not want, and an unbreakable relation to a thing would condemn the owner to having to deal with it. It would indeed be a funny turn of events if the norms serving our interest in property in essence gave the things a person owned a power over him.³⁴

A Lockean labour-based justification of property seems to point in much the same direction — in particular, Locke's 'spoilage' and 'sufficiency' (or 'enough, and as good') provisos would seem to support the desirability of a mechanism by which property can return to a state of nature.³⁵

There are also good economic and environmental cases to be made for abandonment, albeit that the latter is not uncontroversial. In economic terms, abandonment can be seen as facilitating the productive use of assets. Specifically, one advantage of abandonment is that a party who takes possession of deliberately discarded property can exploit it freely, to maximum economic advantage, without having to worry that the owner will reappear and assert his or her rights — a real risk in cases where a third party manages to extract significant value from discarded property. This is important as things are very frequently discarded by their owners as being worthless to them (or at least not worth keeping) despite being of value to someone else. The environmental case for encouraging the free use of discarded items is that in the absence of a law of abandonment more goods might simply be destroyed or left to decay, with

1949) 25 (proposing that a finder does not acquire ownership of a chattel unless it has been 'wilfully abandoned').

³¹ See generally Lior Jacob Strahilevitz, 'The Right to Abandon' (2010) 158 *University of Pennsylvania Law Review* 355.

³² See, eg, Nigel Foster and Satish Sule, *German Legal System and Laws* (Oxford University Press, 4th ed, 2010) 505. According to Foster and Sule, the *Bürgerliches Gesetzbuch* [Civil Code] (Germany) states in § 958 that ownership of unowned moveable property can be acquired by appropriation. One instance in which moveables will be unowned is when they have been abandoned — a concept defined in § 959. Abandonment is described by the authors as taking place 'when the original owner has given up possession with the intention of giving up ownership as with, for example, the abandoning of a newspaper.' We make specific mention of Germany in light of the *Wall Pictures* case discussed below: see below nn 73–75 and accompanying text.

³³ Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right* (T M Knox trans, Clarendon Press, 1952) 52 [65] [trans of: *Grundlinien der Philosophie des Rechts* (first published 1821)]:

The reason I can alienate my property is that it is mine only in so far as I put my will into it. Hence I may abandon (*dereelinquere*) as a *res nullius* anything that I have or yield it to the will of another and so into his possession, provided always that the thing in question is a thing external by nature.

³⁴ J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 79.

³⁵ See John Locke, *The Second Treatise of Government* (Everyman, first published 1690, 1993 ed) §§ 33 (sufficiency), 46 (spoilage).

demand for items that could be reutilised being met instead by new goods whose production will create carbon emissions and consume finite resources. Consequently, as other commentators have pointed out, abandonment has important implications for 'freeganism'.³⁶

A simple illustration of the economic and environmental cases for abandonment, and one which suggests that elements of daily life demand such a doctrine, might relate to the disposal of an old bicycle at a waste transfer station.³⁷ The person disposing of the bicycle might assume that the value of the bicycle is negligible and that the transaction costs of arranging its sale would outweigh any likely return. However, a person working at the station, whether acting on his or her own account or on behalf of an employer, might choose to salvage the bike. He or she might realise that the former owner underestimated its value, or might be able to sell the bike without incurring the same transaction costs by taking advantage of established distribution mechanisms. In such a scenario, rejection of abandonment would have adverse consequences for the market for reclaimed goods and hence undesirable economic and environmental effects. If it were the case that title to the bicycle could not be voluntarily relinquished, then in the absence of an express contractual term³⁸ there would seem to be two main ways to characterise the transaction: first, as one of bailment; and second, as a gift. However, in the absence of an intention to benefit the refuse station, the latter analysis would seem to be wholly artificial and, albeit with some exceptions, would generally require retrofitting the facts to achieve a particular result.³⁹ This

³⁶ See Sean Thomas, 'Do Freegans Commit Theft?' (2010) 30 *Legal Studies* 98; Strahilevitz, above n 31, 357.

³⁷ We use this example to demonstrate that there are times when abandonment can unquestionably serve environmental ends. We acknowledge, however, that the relationship between abandonment and environmental goals is complex. We briefly discuss the relationship between ownership and duties to dispose of waste below: see below n 47 and accompanying text. For a detailed and insightful discussion see Eduardo M Peñalver, 'The Illusory Right to Abandon' (2010) 109 *Michigan Law Review* 191 (emphasising the nuanced relationship between control of land, environmental regulation and the law of abandonment).

³⁸ Such a term might form part of the conditions of admission, and state that all items left for disposal will become the property of the station. There are, however, circumstances where this would not be possible (property is discarded in many different circumstances) and as a practical matter the authors have visited two waste transfer stations in Queensland at which no such term is imposed. Moreover, a doctrine of abandonment aligns the law rather better with what we take to be popular understanding in such a case — namely, that someone who wishes to reuse or recycle an item left at a waste transfer station is free to do so because the item has been discarded, not because of the impact of the terms governing admission.

³⁹ A gratuitous intentional transfer of chattels — ie a gift — requires an intention to transfer rights to the recipient combined with delivery, execution of a deed or declaration of a trust: see, eg, Bridge, above n 28, 94. In the case of a bicycle left at a refuse station, the second aspect would be made out (as there would be delivery) and the key question would be whether the requisite intention had been formed. We believe that in many cases, an owner would not give a second thought to transferring any property rights, and that an abandonment analysis would most accurately reflect his or her state of mind. This is also the case for things like hard rubbish collections, where it may be artificial to argue that a person who left unwanted household goods on the street intended to make a gift to the local council. In that regard, we would question the analysis in *Williams v Phillips* (1957) 41 Cr App R 5, in which it was held that refuse workers who took items during rubbish collections were guilty of theft on the basis that the material always belonged to another, namely the householder (prior to collection) or the council (upon collection).

leaves the bailment analysis, but if the terms of such a transaction were understood to require destruction of the bike (and this would seem the most natural construction if a bailment had indeed been intended),⁴⁰ then its salvage may be characterised as a deviation from the terms of the bailment, and constitute conversion.⁴¹ Application of the *nemo dat*⁴² principle would also allow the owner to bring an action against any downstream purchasers or recipients of the bicycle. This would make finding new markets and new uses for discarded items a much less attractive proposition.

Given the philosophical, economic and environmental cases that can be made for recognising a doctrine of abandonment, it seems strange that questions of whether abandonment is and ought to be possible have remained surrounded by uncertainty for so long. The claim that the common law abhors a ‘proprietary vacuum’ merely begs the question — why should the common law be so keen to ensure that property remains owned? One possible explanation is that a doctrine of abandonment would create legal uncertainty. Taken in the abstract this argument may appear convincing. Most obviously, real uncertainty may attach to the question of whether the owner intended to relinquish his or her rights, or had merely lost or forgotten about the relevant property.⁴³ On further reflection, however, it becomes clear that this argument is problematic and that arguments about certainty cut in different directions. If one takes the example of property that has been found after having been apparently discarded, it is not entirely clear that abandonment increases uncertainty. If the law *does* recognise a doctrine of abandonment, the finder might well be unsure as to whether the property was deliberately discarded rather than accidentally misplaced. In other words, the finder may be unable to ascertain whether the requisite intention was present. However, in the absence of such a doctrine, the finder would still suffer from the uncertainty that the owner might come forward and lay claim to the property. In either scenario, any residual doubt would only be conclusively removed when

⁴⁰ See below n 141 and accompanying text.

⁴¹ The conversion action here would be brought by the former owner of the bicycle. However, if abandonment is possible, we recognise that there may nevertheless be a priority dispute between the refuse worker and the owner of the waste transfer station, who may argue that it acquires rights as occupier of the land on which the bike was left. For similar arguments, see, eg, *Hibbert v McKiernan* [1948] 2 KB 142 (trespasser took from a golf course eight balls that had been abandoned by their owners; however, the occupier had a sufficient interest in the balls for a charge of larceny to be available).

⁴² This is short for *nemo dat quod non habet* — in general, no-one can pass title better than that which they themselves hold: see, eg, Bridge, above n 28, 116.

⁴³ Mere forgetfulness was not sufficient for a former homeowner to lose his rights to a hidden biscuit tin of money in *Moffatt v Kazana* [1969] 2 QB 152. The tin had been stored in a false roof by Mr Russell. Many years later, the house was sold, but the tin was left behind. It was discovered three years after the sale when the new owner was installing an Aga cooker. Significantly, Wrangham J of the Nottingham Assize did not reject the proposition of counsel for the plaintiff that Mr Russell remained the true owner of money left at the house unless he ‘had divested himself ... of the ownership by one of the recognised methods, abandonment, gift or sale’: at 156. In response to this submission, Wrangham J stated: ‘Abandonment is not suggested. One does not abandon property merely because one has forgotten where one put it.’ This response suggests that counsel’s premise was accepted, ie that abandonment is a method for losing rights to personal property.

the relevant limitation period had expired.⁴⁴ Moreover, it must be remembered that there are cases where the circumstances in which property is found will strongly suggest that the owner's intention must have been to abandon it, such as where a newspaper left in a train carriage, or an old bicycle deposited at a waste transfer station. In such a case, a clearly established doctrine of abandonment would add to the finder's security, particularly if the existence of an intent to abandon is to be judged objectively, as the cases seem to suggest,⁴⁵ or if there is a defence to an action brought in conversion for those who reasonably, but incorrectly, believe property to have been abandoned (as was accepted in *Robot Arenas*).⁴⁶

It is also worth adding that the problem of owners emerging to reclaim property is not confined to discarded items. Much the same can occur with consensual transfers and is, for example, a particular risk in cases where a person has received property as a product of a gift executed solely through delivery and has managed to extract some value from the property that the original owner did not intend or foresee. Without any corroborating evidence, the question of whether a gift or a bailment was intended can be very difficult. A doctrine of abandonment would not therefore pose any fundamentally new challenges for the law.

A very different policy-oriented objection to abandonment might relate to concerns about the dumping of rubbish and other harmful products. The environmental case for abandonment would be much more tenuous if it were to provide a vehicle whereby corporations and individuals could avoid obligations to dispose of waste in a safe and environmentally responsible manner. This concern can, however, be disposed of quickly. Environmental restrictions on the disposal of waste are not typically tied to the question of ownership and nor ought they be — it should hardly be a defence to a charge arising out of the illegal disposal of waste that the person dumping the offending matter was a mere bailee and not the owner of the material in question. To the extent that there are exceptions — that is, cases where obligations to dispose of material run with the title to the thing in question — the best approach is to conclude that legislatively imposed regulatory burdens that run with chattel property displace, by necessary implication, the possibility of abandonment.⁴⁷

⁴⁴ Although limitation periods are of general application, they have a particular importance in the law of property, since in this context they provide a means whereby rights of ownership can accrue (to a person in possession) as well as be destroyed. See generally Robert Chambers, *An Introduction to Property Law in Australia* (Lawbook, 2nd ed, 2008) ch 8.

⁴⁵ We deal with this issue in more detail below in Part III.

⁴⁶ Discussed in above n 24.

⁴⁷ See also Strahilevitz, above n 31, 405–7, arguing that owners should be forced to bear the cost of disposal in the case of negative market value resources and that abandonment must not become a vehicle whereby owners can impose negative externalities on society at large. One area in which the courts were required historically to work through the relationship between negative market value resources and abandonment was in relation to wrecks, where the shipowner's motive for seeking to abandon the property was to avoid the costs of salvage and clearance. Compare, for example, *Arrow Shipping Co Ltd v Tyne Improvement Commissioners; The Crystal* [1894] AC 508 and *The Ella* [1915] P 111, drawing a distinction between vessels lost through misadventure, where abandonment served to transfer risk onto the public, and vessels lost through negligence or default, where any purported abandonment would not insulate the owner from a claim brought in negligence or public nuisance.

As a final point, it should be noted that there is perhaps a degree of historical accident as regards the common law's hesitation to recognise a doctrine of abandonment. The first reported decision in which the question of whether property can be abandoned fell to be determined appears to be *Haynes's Case* from 1614, in which it was said 'a man cannot relinquish the property he hath to his goods, unless they be vested in another'.⁴⁸ However, it should be emphasised that this statement was made in the context of a criminal case in which it can be assumed (the report of the decision being extremely scant) that a grave robber was attempting to argue that he was not guilty of larceny because property in the shrouds in question had been abandoned. It is hardly surprising that such an unmeritorious defence was rejected out of hand, in terms that were unnecessarily broad. More generally, it might be noted that there are good reasons for treating some of the older authorities with care. The throwaway culture of modern Western societies would have been unimaginable to the Court in *Haynes's Case*; that things that still have value would be regularly discarded would have been incomprehensible to a court sitting in a society that managed to find a re-use for almost everything, down to and including human urine.⁴⁹

B *Abandonment and Copyright*

In the preceding section it was argued that abandonment can operate as a mechanism for the loss of tangible property rights. If that view is accepted, the question becomes whether abandonment is confined to chattel property or whether it is also possible to abandon rights to a chose in action. One thing that must be noted at the outset is that different answers may arise for different types of intangible property, meaning that it may be fruitless to ask whether it is possible to abandon 'chose in action' generally or even 'intellectual property rights' without specifying further the subject matter under consideration. Nevertheless, it is clear that abandonment *is* possible in relation to at least some types of intangible property. Most notably, there have been repeated obiter comments that the common law proprietary right that is created in a trade mark by its first use in the marketplace can be abandoned.⁵⁰ Such statements have been made in the context of s 58 of the *Trade Marks Act 1995* (Cth) (and that provision's legislative antecedents)⁵¹ and suggest that the prior use of an abandoned mark does not preclude registration of a later substantially identical

⁴⁸ (1614) 12 Co Rep 113, 113; 77 ER 1389, 1389.

⁴⁹ Urine was used in order to help fix dye to wool: Chris Aspin, *The Woollen Industry* (Shire Publications, 1982) 18. See also Peñalver, above n 37, 214–15, who makes a related point about the recent rise of a throwaway culture in the US.

⁵⁰ Admittedly this right is both *sui generis* and unusual in its application in that it only prevents the subsequent registration of a substantially identical mark and not the use of such a mark in the marketplace (although such use might constitute passing off or a breach of the consumer protection regime). Nevertheless, the right is unquestionably proprietary in nature and this is reflected in the statutory language. See generally Robert Burrell and Michael Handler, *Australian Trade Mark Law* (Oxford University Press, 2010) 239–44.

⁵¹ See *Trade Marks Act 1955* (Cth) s 40; *Trade Marks Act 1905* (Cth) s 32.

mark.⁵² A 2007 decision of the Australian Trade Marks Office goes further, with the Hearing Officer accepting the trade mark applicant's argument that the opponent had abandoned its claim to the mark.⁵³ This line of authority has its origins in old UK case law,⁵⁴ where we find at least one decision in which an argument of abandonment of a trade mark was accepted.⁵⁵ There is also persuasive authority from other jurisdictions to similar effect.⁵⁶ Thus, to reiterate, there are very strong grounds for concluding that at least one type of intangible proprietary interest is capable of being abandoned. Importantly, it is also clear that these cases have advanced on the basis that there is a general doctrine of abandonment that applies to trade marks;⁵⁷ abandonment has not been understood as if it were endogenous to the trade mark system.⁵⁸ It is therefore surprising that this line of authority has not received more attention in discussions of abandonment generally.

In light of the trade mark cases it is clear that there can be no overriding objection to the application of the doctrine of abandonment to intangible property, and the question of whether it is possible to abandon copyright must therefore be considered carefully with regard to both the state of the cases and the policy issues at stake. It needs to be accepted at the outset that abandonment is not a clearly accepted mechanism for losing rights in Anglo-Australian copyright law. Nevertheless, when one turns to the case law, one finds a number of instances in which judges have stated that abandonment of copyright is possible. One example relates to the (now abolished) common law right in relation to unpublished works to determine if and when publication would take place.⁵⁹ James Lahore and Warwick Rothnie state that this right 'subsisted in perpetuity *or* until abandonment of the right, *or* publication of the work with the consent of the

⁵² *Marcus v Sabra International Pty Ltd* (1995) 30 IPR 261, 266–7 (Burchett J); *Riv-Oland Marble Co (Vic) Pty Ltd v Settef SpA* (1988) 19 FCR 569, 571–2 (Bowen CJ); *Malibu Boats West Inc v Catanese* (2000) 180 ALR 119, 131–2 [35]–[42] (Finkelstein J).

⁵³ *Lucas Finance Pty Ltd v Dig This Enterprises Pty Ltd* [2007] ATMO 35 (20 June 2007) [56], [73]–[74] (Hearing Officer Lyons). The facts of this decision are somewhat complicated, but in brief the Hearing Officer concluded that the intent to abandon could be inferred from the fact that the opponent had rebranded its business and had failed to adduce any evidence in relation to abandonment beyond a bare assertion that no such intention had been formed.

⁵⁴ See, eg, *Mouson & Co v Boehm* (1884) 26 Ch D 398.

⁵⁵ *Weston Trade Mark* [1968] FSR 77.

⁵⁶ See the New Zealand cases *North Shore Toy Co Ltd v Charles L Stevenson Ltd* [1973] 1 NZLR 562, 569 (McMullin J) and *Melco New Zealand Ltd v Oasis Corporation* [2002] NZIPOTM 42 (15 August 2002), and the South African case *Image Enterprises CC v Eastman Kodak Co* [1989] 1 FSR 353, 357 (MacArthur J).

⁵⁷ See especially *Mouson & Co v Boehm* (1884) 26 Ch D 398, 405 (Chitty J).

⁵⁸ For the avoidance of doubt it should perhaps be emphasised that the doctrine of abandonment in the trade mark context is not a by-product of the statutory requirement of use. The statutory requirement was only introduced into Anglo-Australian trade mark law in 1905 (by virtue of s 37 of the *Trade Marks Act 1905*, 5 Edw 7, c 15) — that is, some 20 years after *Mouson & Co v Boehm* (1884) 26 Ch D 398. Moreover, one of the peculiarities of common law ownership of trade marks is that rights are not limited or removed by non-use, making the doctrine of abandonment of crucial importance.

⁵⁹ See, eg, *Millar v Taylor* (1769) 4 Burr 2303; 98 ER 201; *Jefferys v Boosey* (1854) 4 HLC 815, 962; 10 ER 681, 739 (Lord Brougham).

proprietor.⁶⁰ The key authority in support of the possibility of abandonment was *Millar v Taylor* and particularly the remarks of Aston J.⁶¹ The subsequent case of *Southey v Sherwood*⁶² has been read as lending support to the idea that abandonment of common law copyright might be possible, although the decision in this case can also be explained on other grounds.⁶³

Early 19th century sources also touch on the abandonment of statutory copyright. Most notable is an 1818 British House of Commons Select Committee report in which it was concluded that abandonment should serve to exclude any obligation to deliver deposit copies to the so-called ‘copyright’ libraries (that is, libraries that were legally entitled to the deposit of a free copy of every book published in the UK).⁶⁴ The case of *Rundell v Murray*⁶⁵ also lends weight to the proposition that statutory copyright can be abandoned, although like *Southey v Sherwood*, it is capable of other interpretations.⁶⁶ More recent consideration of abandonment in the context of statutory copyright has come in cases concerning

⁶⁰ James Lahore and Warwick A Rothnie, LexisNexis Butterworths, *Copyright and Designs*, vol 1 (at Service 32) [4000] (emphasis added).

⁶¹ (1769) 4 Burr 2303, 2345–6; 98 ER 201, 224 (citations omitted), noting:

I confess, I do not know, nor can I comprehend any property more emphatically a man’s own, nay, more incapable of being mistaken, than his literary works. And if an author has really and openly abandoned them, that might be found; or the plaintiff on such proof, would fail in his action.

⁶² (1817) 2 Mer 435, 439; 35 ER 1006, 1008 (Lord Eldon LC). In this case, a manuscript had been left with the defendant publisher for many years before the defendant published it. The plaintiff sought an injunction against the defendant. Lord Eldon LC observed: ‘If a man leaves a book of this description in the hands of a publisher, without assigning any satisfactory reason for doing so, and has not enquired about it during twenty-three years, he surely can have no right to complain of its being published at the end of that period.’

⁶³ Analysis of this decision is complicated by the fact that the work in question was of a libellous nature, and hence under the law at that time was arguably not entitled to copyright protection: see, eg, the explanation in *Venus Adult Shops Pty Ltd v Fraserside Holdings Ltd* (2006) 157 FCR 442, 463 [77] (French and Kiefel JJ), 477–8 [130]–[135] (Finkelstein J). That said, in refusing an injunction in *Southey v Sherwood*, Lord Eldon LC noted that he ‘shall say nothing as to the nature of the book itself, because the grounds upon which I am about to declare my opinion render it unnecessary that I should do so’: *ibid* 440; 1008. This could be interpreted to suggest that Lord Eldon LC in fact based his decision on an abandonment-style analysis.

⁶⁴ Select Committee on the Copyright Acts, *Report*, House of Commons Paper No 402 (1818) 5 (resolution 4). It seems that this resolution was inspired by *University of Cambridge v Bryer* (1812) 16 East 317; 104 ER 1109, in which the Court of King’s Bench held that a decision by a publisher to forgo his statutory remedies by declining to register a book at Stationers’ Hall did not absolve him of responsibility to deliver the deposit copies. The submissions in *Beckford v Hood* (1798) 7 TR 620; 101 ER 1164 are also worth noting. In this case counsel for the plaintiff conceded that copyright might be abandoned, providing further evidence that this was the dominant understanding in the legal community around this time.

⁶⁵ (1821) Jac 311, 315–16; 37 ER 868, 870 (Lord Eldon LC). The plaintiff produced a manuscript which included a statement that the work ‘is given to the public’ and that she ‘will receive from it no emolument’: at 311; 868. The manuscript was published by the defendant and turned out to be very popular. After 14 years, the plaintiff sought to exercise her reversionary interest, but was unable to do so because of the terms under which the work had been presented to the defendant and published. In this regard, it is noteworthy that in correspondence with the defendant following the work’s publication, the plaintiff described the transaction as ‘a free gift to one whom I had long regarded as my friend.’

⁶⁶ See, eg, Phillip Johnson, ‘“Dedicating” Copyright to the Public Domain’ (2008) 71 *Modern Law Review* 587, 595–6, who in line with his general thesis (discussed in below Part II(C)(1)) emphasises that the case can be read as turning solely on the Lord Chancellor’s refusal to exercise his discretion to grant an injunction — the reasons for that refusal are not made clear.

drawings in patent specifications. Thus in *Catnic Components Ltd v Hill & Smith Ltd*, Whitford J suggested that by applying for a patent, a patentee could be seen as electing to rely *solely* on his or her patent rights in relation to material in the specification, and that he or she 'must be deemed to have abandoned their copyright in drawings the equivalent of the patent drawings.'⁶⁷ In Australia, Kearney J in *Ogden Industries Pty Ltd v Kis (Australia) Pty Ltd* declined to follow these comments because '*something more*'⁶⁸ than a patent application would be required to divest the patentee of any artistic copyright and because applying any concept of abandonment to drawings *not* in the specification 'seems to run counter to accepted notions of copyright entitlement.'⁶⁹ Consequently, although taking a more restrictive view than Whitford J, it seems that his Honour was prepared to countenance the idea that copyright might be abandoned. Similarly, in the New Zealand case *Plix Products Ltd v Frank M Winstone (Merchants)*, Pritchard J cited with approval a statement from *Copinger and Skone James on Copyright* to the effect that copyright might be abandoned, albeit that he was quick to dismiss the abandonment argument on the facts at hand.⁷⁰ In contrast, in the first instance decision in *British Leyland Motor Corporation v Armstrong Patents Co Ltd*, Foster J was dismissive of the argument that copyright had been abandoned,⁷¹ and this decision has been understood as being antithetical to the view that abandonment of copyright is possible. However, even this case only goes so far as to say that abandonment would be extremely difficult to establish; it is not direct authority for the proposition that copyright can never be abandoned.⁷²

Our reading of the cases is therefore that there is good reason to suggest that copyright can be abandoned under Australian (and UK) law, albeit that no coherent body of law has yet emerged. Our view in this respect is fortified by the position elsewhere. Admittedly, there are some jurisdictions in which abandonment arguments have recently been rejected. One example is the *Wall Pictures* case from Germany.⁷³ That case was brought by artists who had painted large-scale murals on the Berlin Wall in the mid to late 1980s. A number of years later, following the reunification of Germany and dismantling of the Wall, segments of

⁶⁷ [1978] FSR 405, 428.

⁶⁸ [1982] 2 NSWLR 283, 300 (emphasis added).

⁶⁹ *Ibid.* To our minds Kearney J's position has to be correct. The interpretation adopted by Whitford J would seem to rest on a broad notion of constructive abandonment which we believe represents an unwise attempt to stretch the doctrine of abandonment beyond its natural confines: see below Part III. Nevertheless, for present purposes, Whitford J's acceptance of the possibility of abandonment remains instructive.

⁷⁰ [1986] FSR 63, 87–8, citing E P Skone James, John F Mummery and J E Rayner James (eds), *Copinger and Skone James on Copyright* (Sweet & Maxwell, 12th ed, 1980) 119–20 [307].

⁷¹ [1982] FSR 481, 492.

⁷² The abandonment argument was not pressed before the Court of Appeal: *British Leyland Motor Corporation v Armstrong Patents Co Ltd* [1984] FSR 591, 594. Although this point was the subject of submissions before the House of Lords, their Lordships did not comment on this aspect of the appellant's case: *British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd* [1986] 1 AC 577.

⁷³ Bundesgerichtshof [German Federal Court of Justice], I ZR 68/93, 23 February 1995 reported in (1995) 129 BGHZ 66. We have used the English translation of the case provided in (1997) 28 *International Review of Industrial Property and Copyright Law* 282.

these were sold at an auction in which the defendant was involved. The plaintiffs sought a share of the proceeds. One of the preliminary matters dealt with by the German Federal Court of Justice was whether the owner of property on which an artistic work was unlawfully created had unfettered discretion in how to deal with that property. It was held that he or she did not, and that while removal of the work might be permissible, commercial exploitation was not.⁷⁴ The defendant's argument that the artists had abandoned their rights could not be accepted, as 'an abandonment of rights comparable to dereliction in the law of property is unknown to copyright law. There is no "ownerless" copyright.'⁷⁵

In contrast to the *Wall Pictures* case, however, there is a long line of authority in the US to the effect that copyright can be abandoned. In one of the earliest cases, *National Comics Publications Inc v Fawcett Publications Inc*, decided in 1951, the Court of Appeals for the Second Circuit stated:

We do not doubt that the 'author or proprietor of any work made the subject of copyright' by the *Copyright Law* may 'abandon' his literary property in the 'work' before he has published it, or his copyright in it after he has done so; but he must 'abandon' it by some overt act which manifests his purpose to surrender his rights in the 'work,' and to allow the public to copy it.⁷⁶

Copyright scholars in the US have also generally been supportive of the idea that copyright should be capable of abandonment. For example, one author has stated that

the copyright system is an incentive system, not a coercive one. ... [N]othing in the *Constitution* or the *Copyright Act* compels an author to accept the benefits of copyright; nothing compels him to distribute his work to the public. An author is free to destroy or withhold the work rather than to distribute the work.⁷⁷

This statement seems to us to be obviously correct. If one accepts that copyright is intended to act as an incentive to invest in the creation and dissemination of works, it is surely of no concern if the intended recipient of rights chooses to renounce his or her entitlement. Alternatively, if one adopts a natural rights view of why copyright protection is warranted, it has already been seen that both Lockean and Hegelian property theory would seem to point towards the desirability of allowing abandonment, and this is as much true of copyright as it is of any other form of property. It is therefore submitted that the position adopted in the US provides a safer guide than the position adopted in Germany, where copyright cannot be fully alienated even by means of consensual transfer.⁷⁸ The

⁷⁴ *Wall Pictures* (1997) 28 *International Review of Industrial Property and Copyright Law* 282, 284–5.

⁷⁵ *Ibid* 285.

⁷⁶ 191 F 2d 594, 598 (Learned Hand J) (citations omitted) (2nd Cir, 1951). For a comprehensive list of US cases dealing with the abandonment of copyright see William F Patry, West, *Patry on Copyright*, vol 2 (at August 2011) § 5:155.

⁷⁷ Robert A Kreiss, 'Abandoning Copyrights to Try to Cut Off Termination Rights' (1993) 58 *Missouri Law Review* 85, 99 (citations omitted).

⁷⁸ *Gesetz über Urheberrecht und verwandte Schutzrechte* ('*Urhebergesetz*') [Law on Copyright and Neighbouring Rights] (Germany) 9 September 1965, BGBI I, 1965, 1273, §§ 28, 29 (together

possibility of abandoning copyright is also important given the recent focus on developing new forms of copyright management that facilitate public access and re-use. While some of these mechanisms are predicated on the creator or rights-holder retaining his or her copyright (such as the prospective licensing used by Creative Commons and others), in other examples the owners seek to divest themselves of any rights by dedicating the work to the public domain.⁷⁹ It is in this context that Johnson has argued that copyright cannot be abandoned under UK law and that a dedication to the public only serves to create a bare licence that can be revoked at will.⁸⁰ In the course of developing this argument Johnson identifies two key objections to allowing copyright to be abandoned and it is important to consider whether these and other potential objections can be addressed.

C Objections to Abandonment of Copyright

1 Johnson's Objections

Johnson's first argument against recognising that copyright can be abandoned, and the one he develops at greatest length, is that such a doctrine would be incompatible with international obligations relating to the minimum duration of copyright.⁸¹ Specifically, Johnson notes that under art 7(1) of the *Berne Convention for the Protection of Literary and Artistic Works* ('*Berne Convention*'),⁸² the minimum term of protection is the life of the author and 50 years thereafter. He goes on to note that although member states are free to provide a lesser standard of protection for their own nationals,⁸³ there is no exception that would allow them to shorten the term for foreign works. Consequently, he concludes that a

limiting the circumstances in which copyright can be transferred to testamentary disposition, gifts *causa mortis* and transfers in settlement of an estate): see the translation and explanation in Alexander R Klett, Matthias Sonntag and Stephan Wilske, *Intellectual Property Law in Germany: Protection, Enforcement and Dispute Resolution* (Verlag CH Beck, 2008) 61, 280. See generally J A L Sterling, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law* (Sweet & Maxwell, 3rd ed, 2008) 585. See also below n 103 and accompanying text, where we discuss the relationship between the German prohibition on inalienability and a natural rights understanding of copyright.

⁷⁹ To be more specific, Creative Commons used to have a dedication to the public domain, but this has now been replaced with the 'CC0' or 'CCZero' scheme which is intended to signal that the owner does not wish to retain any form of control over the work and which, on our analysis, would serve to effect an abandonment of copyright. For further information see Creative Commons, *CC0* <<http://creativecommons.org/choose/zero>> and Creative Commons, *About CC0 — 'No Rights Reserved'* <<http://creativecommons.org/about/cc0>>.

⁸⁰ Johnson, above n 66, 604–7. As we also note in Part III, Johnson is clearly correct insofar as he concludes that bare licences are revocable at will.

⁸¹ *Ibid* 602–3.

⁸² Opened for signature 9 September 1886, [1901] ATS 126 (entered into force 5 December 1887), as last revised by the *Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works*, signed 24 July 1971, 1161 UNTS 30 (entered into force 15 December 1972), and further amended by the *Amendments to Articles 22 and 23 of the Paris Act of 14 July 1971 of the Berne Convention for the Protection of Literary and Artistic Works*, signed 28 September 1979, [1984] ATS 40 (entered into force 19 November 1984).

⁸³ Johnson, above n 66, 602. See *Berne Convention* art 5(3).

doctrine of abandonment must be rejected, at least as regards foreign works.⁸⁴ This appears to provide a knockdown objection to allowing copyright to be abandoned and is particularly significant given that the *Berne Convention* standard is incorporated into the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('TRIPS')⁸⁵ and hence attracts the World Trade Organization ('WTO') dispute resolution procedure. Arguments grounded in compatibility with international norms have a particular resonance in the Australian context, because Australia has for some time prided itself on meticulous compliance with its international obligations in the intellectual property field.⁸⁶ The US may be happy to retain a system of abandonment safe in the knowledge that it is highly unlikely to be the subject of a WTO complaint.⁸⁷ For an Australian court, however, the prospect of placing Australia in breach of its international obligations would likely be treated as a significant cause for concern and would weigh heavily against recognising a doctrine of abandonment.

The problem with Johnson's argument lies not in how it is developed, but in its starting point — namely, that rules on abandonment relate to the question of *duration* rather than to the question of *ownership* of copyright. To explain, we would argue that the effect of abandonment is not to shorten the copyright term per se but to divest the abandoning owner of title to the work, such that copyright remains technically in existence but is unowned and hence incapable of enforcement. So understood, any objection to abandonment based on its conflict with treaty obligations falls away because the treatment of ownership remains largely unharmonised at the international level and countries continue to maintain very different rules in this regard. For example, provisions governing

⁸⁴ Johnson, above n 66, 603.

⁸⁵ See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') art 9(1).

⁸⁶ See, eg, Philip Ruddock, 'Opening Address' (Speech delivered at the Australian Centre for Intellectual Property in Agriculture's Copyright: From 'The Da Vinci Code' to YouTube Conference, Brisbane, 16 February 2007) (noting 'the importance of being a good international citizen in relation to copyright').

⁸⁷ There are a number of respects in which current US copyright law fails to comply with international norms. For example, the US has resisted calls to expand its limited moral rights provisions to meet the requirements of art 6bis of the *Berne Convention*: see Robert C Bird and Lucille M Ponte, 'Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the UK's New Performances Regulations' (2006) 24 *Boston University International Law Journal* 213, 216. It has also refused to change its law to comply with an adverse ruling of the WTO Dispute Settlement Body in the s 110(5) case (concerning exceptions to the performance right in musical works): see Panel Report, *United States — Section 110(5) of the US Copyright Act*, WTO Doc WT/DS160/R (15 June 2000), and note the subsequent arbitration proceedings in Decision by the Arbitrator, *United States — Section 110(5) of the US Copyright Act — Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS160/12 (15 January 2001). The US administration still maintains in regular communications to the WTO that it 'will continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter': Mission of the United States in Geneva, *Statement by the United States at the November 23, 2010 DSB Meeting* (23 November 2010) <<http://geneva.usmission.gov/2010/11/23/november23-dsb>>.

works created in the course of employment or pursuant to a commission vary greatly between members of the *Berne Convention*.⁸⁸

This analysis may strike some readers as resting on a legal fiction, or as resting on drawing a distinction without a difference. It must, however, be remembered that to recognise a doctrine of abandonment would merely be to apply to copyright a general legal principle that is (on our analysis) relevant to many other forms of personal property. There is no question that general legal and equitable principles can result in copyright becoming incapable of enforcement in certain circumstances or can divest an owner of his or her rights. It is clear, for example, that international norms do not prohibit the application of ordinary principles of estoppel or prevent a finding that equitable title to a work has passed out of the hands of the plaintiff. Once abandonment of copyright is conceived in this way it looks less like a legal fiction and more like part of a suite of rules that are simply untouched by the international conventions relating to copyright.

This conclusion can be fortified by considering what steps a country might take if it were determined to legislate for the possibility of abandonment whilst placing the issue of compliance with international norms beyond all question. In light of the free hand left to members of the *Berne Convention* to deal with questions of ownership, it is clear that a country would, for example, be free to legislate to the effect that a dedication to the public domain serves to vest copyright in a public body and then to direct that trustee to make the work freely available for use by the public. There can therefore be no question that a country is entitled to have within its law a mechanism whereby copyright can, in effect, be abandoned; there can be no substantive objection to the possibility of abandonment from an international law perspective. If this is right, the issue is only whether particular mechanisms for effecting abandonment are objectionable, and we believe that there is no reason for reading the international conventions in a prescriptive way.

Johnson's second objection to abandonment is that it would result not in a work falling into the public domain, but rather in copyright being vested in the Crown as a consequence of the *bona vacantia* doctrine.⁸⁹ Johnson does not spell out his precise understanding of the scope of this doctrine, but he is clearly of the view that property in any ownerless chose in action would vest in the Crown by virtue of the doctrine's operation. Perhaps the first thing to note is that even by the standards of this area of law, the operation of *bona vacantia* is obscure. Complicating the picture further is the fact that many of the most (financially) important elements of the doctrine have now been codified by statute.⁹⁰ Never-

⁸⁸ See Sterling, above n 78, 224–9.

⁸⁹ Specifically, Johnson relies on the *bona vacantia* doctrine to bolster his argument that abandonment would have to be understood as bringing the term of copyright to an end rather than rendering the copyright ownerless: Johnson, above n 66, 593. See also Peter Groves, 'There's Nothing New around the Sun: Everything You Think of Has Been Done' (2007) 18 *Entertainment Law Review* 150, 152, also taking the view that abandonment would result in the Crown owning copyright *bona vacantia*, but reaching this conclusion without analysis.

⁹⁰ See, eg. *Succession Act 1981* (Qld) s 35, sch 2 pt 2 and *Administration and Probate Act 1958* (Vic) s 55 (both dealing with persons who die intestate); *Corporations Act 2001* (Cth)

theless, insofar as it is possible to reach definite conclusions in this area, it seems to us that there are three related reasons for concluding that abandoned copy-rights would not vest in the Crown.

First, despite the odd obiter statement to the contrary,⁹¹ it seems tolerably clear that not all ownerless property belongs to the Crown.⁹² Rather, the doctrine only applies to certain specific categories of ownerless property, some of which are well-established and others much more controversial. Importantly, there is nothing to suggest that all ownerless *intangible* property belongs to the Crown, even when regard is had to the more controversial categories.⁹³ Secondly, when one looks at how the doctrine applied historically, it is notable that it would at times serve to vest rights in the Crown where property was clearly owned but the owner could not be readily identified.⁹⁴ This reinforces the point that there is no clear symmetry between the application of the doctrine and ‘ownerless’ things. Thirdly, there is authority that a positive act of abandonment can sometimes displace any *bona vacantia* entitlement. In particular, the common law rules relating to treasure trove vest rights in the Crown only in cases where the treasure has been ‘hidden’ and is intended to be reclaimed. If the person setting the treasure aside forms an intention to abandon it, the property simply returns to a state of nature and *bona vacantia* is inapplicable.⁹⁵ This, more than anything,

s 601AD(1A) (property of a dissolved company held on trust vests in the Commonwealth); *Companies Act 2006* (UK) c 46, s 1012 (also dealing with property held on trust for a dissolved company); *Treasure Act 1996* (UK) c 24, s 4(b) (replacing the common law of treasure trove).

⁹¹ See especially *Re Wells; Swinburne-Hanham v Howard* [1933] 1 Ch 29, 55 (Romer LJ): ‘the Crown is entitled to all personal property that has no other owner.’ It should be emphasised that this statement was made in the context of a case that dealt with the *types* of property that fell to the Crown on dissolution of a company (a recognised trigger for the application of the *bona vacantia* doctrine) and was not therefore directed at the broader question under consideration here.

⁹² See Andrew Bell, ‘Bona Vacantia’ in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (LLP, 2nd ed, 1998) 207, 211–12; Noël D Ing, *Bona Vacantia* (Butterworths, 1971) 7–8. Ing relies on a statement from Joseph Chitty, *A Treatise on the Law of the Prerogative of the Crown; and the Relative Duties and Rights of the Subject* (Joseph Butterworth and Son, 1820) 136 (emphasis in original):

The general rule seems to be that *bona vacantia* only belong to the King in *certain instances*, particularly defined by the common law, and in which certain valuable and distinguished articles are expressly selected and set apart for the King, as worthy his acceptance and necessary to support, and especially suitable to his royal dignity ...

Chitty lists examples including swans, whales, gold and silver mines, treasure trove and wrecks.

⁹³ On the contrary, courts have at times shown themselves to be reluctant to hold that intangible property has passed to the Crown. See especially *Re Taylor’s Agreement Trusts* [1904] 2 Ch 737, 741–2 (Buckley J) (holding that if the legal interest in a patent vested in the Crown on the dissolution of a company, the patent ‘merged’ with the Crown since ‘the Crown cannot be a grantee from itself’); *Re Higginson & Dean; Ex parte A-G* [1899] 1 QB 325, 332–3 (Wright J) (stating, but not deciding, that it is arguable that a debt due to a corporation is extinguished on dissolution of a company and does not pass to the Crown *bona vacantia*). Although not followed in later cases (see respectively *Re Dutton’s Patent* (1923) 40 RPC 84 and *Re Wells; Swinburne-Hanham v Howard* [1933] 1 Ch 29), the earlier decisions help reinforce the point that claims that the *bona vacantia* doctrine is of broad application need to be treated with care.

⁹⁴ See F A Enever, *Bona Vacantia under the Law of England* (His Majesty’s Stationery Office, 1927) 69 (discussing the application of the doctrine in cases of treasure trove).

⁹⁵ *Ibid* 68; N E Palmer, ‘Treasure Trove and the Protection of Antiquities’ (1981) 44 *Modern Law Review* 178, 182 (noting at 182 n 28 that ‘[t]he authorities are unanimous in this requirement’, ie that the goods were hidden with the intention of eventually retrieving them).

underscores the point that the historical operation of the *bona vacantia* doctrine does not point to the conclusion that title to an abandoned work would inexorably vest in the Crown.

Admittedly, and despite the points raised in the previous paragraph, it must be conceded that the state of the law is such that a court that was so minded might be able to find a basis for concluding that all ownerless copyrights vest in the Crown. However, this would require a judicial expansion of the *bona vacantia* doctrine at a time when legislation has displaced a number of its traditional fields of operation. In our view there is no reason of principle or policy why a court should be attracted to such an interpretation.

2 Other Objections

If neither of Johnson's objections provide a satisfactory basis for rejecting abandonment of copyright, it is important to consider two other issues that may impact upon its recognition. The first is how a doctrine of abandonment would intersect with protection for an author's moral rights. Mention has already been made of the *Wall Pictures* case in Germany,⁹⁶ which was argued by reference to the right of distribution⁹⁷ but whose facts might also implicate the moral rights of integrity and divulgation,⁹⁸ in particular because the work was physically segmented.⁹⁹ This raises the question of whether it is possible to reconcile a doctrine of abandonment of copyright with the inalienability of moral rights.¹⁰⁰

In terms of German law, it is notable that the conception of copyright is unusual in that it does not draw a sharp division between moral and economic rights, instead understanding the rights given to authors as a single package which collectively safeguards both types of interest.¹⁰¹ One important way this manifests is in the alienation of copyright, which as noted above is transferable only in limited circumstances.¹⁰² Given the philosophy and structure of German

⁹⁶ See above nn 73–75 and accompanying text.

⁹⁷ The right of distribution is defined in § 17 of the *Urhebergesetz* [Law on Copyright and Neighbouring Rights] as 'the right to offer the original or copies of a work to the public or to place them on the market': see the English translation in Klett, Sonntag and Wilske, above n 78, 272.

⁹⁸ In addition to integrity and paternity rights, German law also recognises a right to control whether and how a work is first released or disclosed to the public: *Urhebergesetz* [Law on Copyright and Neighbouring Rights] § 12. See the English translation in Klett, Sonntag and Wilske, above n 78, 270. For further discussion of the divulgation right see Sterling, above n 78, 395.

⁹⁹ For instance, artist Bernard Buffet invoked his moral rights to successfully obtain orders in France preventing the sale of a single panel from a refrigerator that he had painted for a charity auction. The basis was that he had created only one work and had not authorised its division into separate panels. For discussion, see John Henry Merryman, 'The Refrigerator of Bernard Buffet' (1976) 27 *Hastings Law Journal* 1023.

¹⁰⁰ It is clear that in Australia moral rights are inalienable and not capable of general waiver (although authors can provide certain forms of ex ante consent): see *Copyright Act 1968* (Cth) ss 195AN(3), 195AW–195AWA.

¹⁰¹ For this reason German law is sometimes said to rest on a 'monist' conception of author's rights. In contrast, French law, which does draw a distinction between moral rights and economic rights, is described as resting on a 'dualist' theory of author's rights. For discussion see Sterling, above n 78, 46.

¹⁰² See Klett, Sonntag and Wilske, above n 78, 59.

law, it is therefore unsurprising that the Court in *Wall Pictures* was not attracted to the defendant's abandonment argument,¹⁰³ and care should be taken before drawing too much from the result in that case.

In Australia, the interaction of economic and moral rights is best explored by considering the case of works that have been dedicated to the public domain. If, as we would suggest, such a dedication effects an abandonment of copyright then anyone would be free to reproduce the work or perform it or communicate it to the public. Yet the author's moral right of integrity would remain, allowing the author to control certain forms of derivative use. In cases where the abandoning owner is not also the author this result may seem entirely appropriate, but where the author and abandoning owner are one and the same it may seem counterintuitive. A member of the public who sees an express statement to the effect that the author-owner disclaims his or her copyright might be forgiven for thinking that this extended to the full suite of rights granted under the *Copyright Act 1968* (Cth). Moreover, at least some advocates of the public domain who might be prepared to abandon copyright via a dedication to the public would be likely to insist that users should be free to re-imagine or 'recode' their work, including in ways which, on a conventional analysis, might constitute a derogatory treatment.¹⁰⁴

The above analysis might suggest that copyright law is unavoidably and irredeemably antithetical to the public domain agenda and that it is naive to look to a doctrinal rule like abandonment as providing even a partial solution to what is ultimately a clash of ideologies.¹⁰⁵ On closer inspection, however, the doctrinal problem of the relationship between abandoned works and the continued subsistence of moral rights may not be what it seems. Although the *Copyright Act 1968* (Cth) leaves no room for the complete divestment of moral rights, an act evincing an intention to abandon could be used to inform whether there has been a breach of moral rights or whether a defence might apply. In particular, under Australian law rights of attribution and integrity are subject to an overarching reasonableness defence.¹⁰⁶ Some of the factors to which the court is directed to give attention, such as the nature of the work and practices within the relevant

¹⁰³ To be clear, the point we are making here is that the philosophical basis of German law has inspired a set of legal arrangements (the absence of a clear demarcation between moral rights and economic rights and a prohibition on the inalienability of rights) that is difficult to reconcile with a doctrine of abandonment. It is, however, important to emphasise that the form that German law takes must not be seen as if it were somehow a perfect or pure reflection of a natural rights understanding of copyright. Rather, German law, like all legal systems, has had to accommodate more prosaic concerns, such as the disparity in bargaining power between authors and publishers. This has led Germany to adopt rules on alienability that are intended to provide strong protection for authors by creating a bright-line rule to the effect that an outright transfer of rights is never possible. This logic may well serve to exclude the possibility of abandonment, even though a natural rights understanding of copyright might well, as we have seen, strongly suggest that abandonment should be allowed.

¹⁰⁴ See especially the effect of the CC0 scheme (discussed at above n 79), which seeks to effect a waiver of moral rights to the maximum extent permitted by law.

¹⁰⁵ See generally Susan Corbett, 'Creative Commons Licences, the Copyright Regime and the Online Community: Is There a Fatal Disconnect?' (2011) 74 *Modern Law Review* 503.

¹⁰⁶ See respectively ss 195AR and 195AS of the *Copyright Act 1968* (Cth).

industry,¹⁰⁷ would allow the court to give a great deal of weight to the fact that a work had been abandoned by the author when determining whether the defendant had breached the plaintiff's moral rights.¹⁰⁸ As for the broader ideological question, there are, no doubt, some opponents of the current copyright system who would argue that even if the continued subsistence of moral rights does not fundamentally undermine abandonment, such a doctrine does nothing to address deeper objections to the logics and structures of copyright. This is undoubtedly true, but the scope and nature of copyright have long been contested, and the law has had to find practical ways of navigating different models of creation and exploitation. In the case of works that have been dedicated to the public, abandonment would provide a way of giving legal force to the social understanding of what such a dedication is intended to achieve. Abandonment would at least go some way towards reconciling the copyright system with its critics and, as we explore in Part III, might have other important benefits.

A second issue, and further potential objection to the application of a doctrine of abandonment in the copyright context, is that there is a mismatch or lack of symmetry between the consequences that flow from the abandonment of copyright and those that flow from the abandonment of chattels. As has been seen, on our analysis abandonment serves to render copyright unenforceable once and for all. In contrast, abandonment of chattel property is often a mere prelude to rights vesting in another, with abandonment serving as a vehicle whereby a person who later takes possession of a chattel becomes its owner. The absolute nature of abandonment in the copyright context could be taken to suggest that there is something 'different' or 'unusual' about this form of property that makes the application of the general doctrine inappropriate.¹⁰⁹ This objection may at first appear compelling, but on further reflection we believe it is seriously flawed.

In order to explain why we find the asymmetry argument unconvincing it is necessary to revisit some basic jurisprudential questions. As has been seen, there is a strong economic case for recognising abandonment. This is true as regards both chattels and copyright. However, when one turns to consider arguments for allowing things to be 're-owned', matters diverge. Chattels are, to use the language of economics, rivalrous goods. The possession and use of a chattel by one person largely precludes its possession and use by others. For economic theorists, assigning property rights over rivalrous goods serves a number of important functions: it helps reduce public order and private policing costs;¹¹⁰ it encourages the optimal use of resources by allowing users of property to

¹⁰⁷ Ibid ss 195AR(2), 195AS(2).

¹⁰⁸ In the alternative it might perhaps be argued that an act of abandonment amounts to 'consent' to any use or treatment of the work that follows. However, this argument would face the obstacle that (other than in the employment context) consent can only be given in relation to 'specified acts or omissions, or specified classes or types of acts or omissions': *ibid* s 195AWA(3)(a).

¹⁰⁹ It might be added that this argument could be extended to accommodate the abandonment of trade marks, since in this context too abandonment is often merely a prelude to a mark being appropriated by a later market entrant.

¹¹⁰ A nice summary of this argument is provided by Robert Cooter and Thomas Ulen, *Law & Economics* (Pearson, 5th ed, 2008) ch 4.

internalise the benefits of expenditure aimed at maintaining and improving property;¹¹¹ and it facilitates voluntary, utility-maximising exchanges.¹¹² Crucially, these arguments apply with as much force to things that have been abandoned as they do to things that have never been owned. There is, therefore, a strong economic case for allowing abandoned chattels to become re-owned.

In contrast, because copyright works are non-rivalrous, the economic case for allowing re-ownership is much weaker. Copyright works can be 'possessed' and enjoyed by many people simultaneously. Consequently, refusing to permit a work to become re-owned does not create anything like the same onerous public order and policing costs that would be associated with the adoption of such a rule in relation to chattels; there are few maintenance costs that need to be internalised; and works can be shared, such that there is no need for a market mechanism to ensure that they are allocated to a limited class of persons who would value them most highly.¹¹³ More generally, it should be remembered that the economically efficient price for non-rivalrous goods is the marginal cost of provision. Once a copyright work has been created and abandoned there is no reason to provide anyone with a right that is largely intended to help offset the costs of *production*.

Admittedly, it might be countered that account must be had of the costs of *distribution*: if the costs of distribution cannot be internalised this might lead to an undersupply of the work in question. However, copyright law already provides mechanisms that are intended to deal with precisely this problem. In addition to conferring protection on authorial works, the *Copyright Act 1968* (Cth) creates separate rights in sound recordings,¹¹⁴ broadcasts¹¹⁵ and published editions.¹¹⁶ One justification for such rights is that they assist commercial actors internalise the costs of distributing works that no longer enjoy copyright protection. If Parliament has taken the view that these 'neighbouring rights' are sufficient to cover the costs of distribution in the case of works that are out of

¹¹¹ See, most famously, Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 *American Economic Review* 347, especially at 356. The Demsetzian case for property rights can be made in relation to chattels as follows. Imagine a world in which motor vehicles were communally owned, with repair bills being met through central taxation. In such a universe individuals would have little incentive to modify their use of a vehicle in order to help maintain it in good condition — potholes would not need to be avoided, there would be no need to slow down because of loose chippings on the road, no-one would pay to upgrade a vehicle through the substitution of improved aftermarket parts, etc.

¹¹² To elaborate, most economists would insist that property rights help facilitate the transfer of goods to persons who value them most highly, thereby maximising social welfare. It has been argued further that property rights are structured in such a way as to smooth the transfer of goods. See Henry Hansmann and Reinier Kraakman, 'Property, Contract, and Verification: The *Numerus Clausus* Problem and the Divisibility of Rights' (2002) 31 *Journal of Legal Studies* S373 (discussing, for example, how the law's general resistance to servitudes on chattels helps avoid 'verification' problems for parties to a transaction).

¹¹³ See further Brett M Frischmann and Mark A Lemley, 'Spillovers' (2007) 107 *Columbia Law Review* 257, who take issue with intellectual property maximalists who insist, by analogy to other forms of property, that complete internalisation is necessary to ensure that intellectual goods are put to best (utility-maximising) effect.

¹¹⁴ *Copyright Act 1968* (Cth) s 89.

¹¹⁵ *Ibid* s 91.

¹¹⁶ *Ibid* s 92.

copyright, the same must be true for works that are technically still in copyright, but which have been abandoned.¹¹⁷ A related point can be made about improvement costs. It might be objected that the law needs to provide a mechanism whereby persons who invest in ‘improving’ a work, for example by reworking parts of a manuscript or arranging for a dramatic work to be filmed or performed, can recoup their expenditure. But again, our legal rules generally produce exactly this outcome — the person who reworks a manuscript is highly likely to be treated as having created an original derivative work that will attract its own copyright protection¹¹⁸ and the person who arranges for a film to be produced will likewise own copyright in the film.¹¹⁹ Insofar as the law fails to provide a new derivative form of protection, this is often because the person making the investment will have other ways of capturing the benefit of his or her outlay — for example, the person who stages a play will generally be able to secure a return by controlling access to the premises in which it is being performed. In our view, therefore, if the non-rivalrous nature of copyright works is borne in mind and if one takes account of existing mechanisms that allow distribution costs to be internalised, there is no need to allow copyright works to be re-owned.

In light of the above it can be concluded that judged in economic or instrumental terms, the absence of symmetry between chattel property and copyright is not a cause for concern; on the contrary, it is to be welcomed. Whereas arguments founded in fears about the ‘tragedy of the commons’¹²⁰ and the like apply with just as much force to abandoned physical property as they do to property that was never owned, in the case of copyright works that are already in existence the primary concern has to be with the tragedy of the anticommons¹²¹ — namely, that the unnecessary grant of property rights may create a significant deadweight loss.

The asymmetry argument fares little better, moreover, when assessed in philosophical terms. We have seen that both Lockean and Hegelian property theory strongly suggest that property should be capable of abandonment. Both justificatory theories would also seem to demand opportunities for re-ownership where a person encountering abandoned property mixes his or her labour with it, or makes it the subject of his or her will. This is consistent with the law conferring ownership on someone who takes possession of an abandoned chattel. Importantly, however, it is also consistent with the copyright rules outlined above. As

¹¹⁷ In the case of other forms of distribution that do not attract neighbouring rights protection, in particular distribution online, it can be argued that the costs of distribution are so low that there is no need for such protection.

¹¹⁸ See, eg, *Sawkins v Hyperion Records Ltd* [2005] 1 WLR 3281.

¹¹⁹ *Copyright Act 1968* (Cth) s 90.

¹²⁰ This language was famously introduced into property discourse by Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243.

¹²¹ The phrase ‘tragedy of the anticommons’ was initially coined by Michael A Heller, ‘The Tragedy of the Anticommons: Property in the Transition from Marx to Markets’ (1998) 111 *Harvard Law Review* 621. Heller’s principal concern was with the impact of overlapping rights of exclusion leading to a resource being underutilised, but the language of the anticommons has since taken on a broader usage in arguments over the scope of intellectual property protection.

has been seen, the law confers copyright protection on derivative works provided that they are original — a test that is a reasonable proxy for the grant of rights in both Lockean and Hegelian terms. In other instances, neighbouring rights could be understood to confer the requisite degree of protection. Consequently, there is a good case for concluding that the dominant ethical justifications for the grant of property rights are broadly consistent¹²² with a legal regime that confers protection on the ‘finder’ of an abandoned work through neighbouring rights and through the grant of copyright in original derivative works, but which refuses to confer de novo protection over the abandoned work per se.

III DETERMINING ABANDONMENT AND ITS APPLICATION TO ORPHANED WORKS

If the preceding analysis is accepted, the question becomes how to judge whether the owner of copyright has abandoned his or her rights. On this point, there is consensus in the case law in relation to chattels that intention is required and it is this intention that differentiates abandonment from the mere loss of goods.¹²³ Thus, abandonment can be seen as the ‘twin’ of intentional transfer: both involve a voluntary divesting of rights, one to a recipient, and the other not. In terms of proving the requisite intention, in *Robot Arenas* Mr Edelman QC quoted with approval from Palmer that ‘[c]lear evidence both of intention to abandon and of some physical act of relinquishment will be required’.¹²⁴ This chimes closely with the law of abandonment as it applies to copyright works in the US, where it has been held that there are two essential prerequisites for a finding that copyright has been abandoned, namely, ‘an intent to surrender all rights in the work’ and ‘an overt act evidencing that intent.’¹²⁵

One scenario in which copyright should unquestionably be treated as abandoned is where a work has been published together with an express statement to the effect that the copyright owner intends the work to enter the public domain. Such a statement might come in the form of a more traditional dedication to the public or through the publication of a work under a Creative Commons CC0 licence.¹²⁶ In most cases abandonment will take effect immediately, but where the copyright owner expresses the desire to divest itself of copyright from some

¹²² At this point it might be noted that natural law theorists invariably accept that the precise form that property rights take will be determined by municipal law: Peter Drahos, ‘Intellectual Property and Human Rights’ (1999) 3 *Intellectual Property Quarterly* 349, 350–1.

¹²³ See, eg, *Moorhouse v Angus and Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700, 702 (Hutley JA), 706 (Samuels JA), 712–13 (Mahoney JA); *Re Jigrose* [1994] 1 Qd R 382, 384 (Kiefel J); *Sims v SPM Business Consultants Pty Ltd* (2002) 43 ACSR 633, 643 [52] (Hely J).

¹²⁴ [2010] EWHC 115 (QB) (8 February 2010) [14], quoting *Palmer on Bailment*, above n 22, 1410 [26-030].

¹²⁵ Patry, above n 76, § 5:155, citing *Capitol Records Inc v Naxos of America Inc*, 372 F 3d 471, 483 (Newman J for Newman, Raggi and Underhill JJ) (2nd Cir, 2004).

¹²⁶ See above n 79 for a discussion of the CC0 scheme.

future date there is no reason not to allow for future abandonment, provided that the date from which abandonment will occur is clearly specified.¹²⁷

As we noted in Part II(C)(2), one of the attractions of a doctrine of abandonment is that it aligns the law with what copyright owners are attempting to achieve when they purport to place works in the public domain. However, considerations of 'fit' or 'alignment' would also point towards recognising the possibility of abandonment in other types of case. These include situations where any claim to copyright has been relinquished pursuant to the terms of a contract. Consider, for example, an essay, poetry or painting competition where one of the terms of entry is that the author will not assert any claim to copyright in the work submitted.¹²⁸ Treating copyright as having been abandoned would again seem to fit with what such a term would be seeking to achieve.

Another example is the inter vivos deposit of a diary by its author to a major public library, where one of the conditions of donation is that the diary will not be made available to readers until five years after the author's death and thereafter will be made freely available for reproduction and distribution. Whilst careful attention would have to be paid to the terms of the deposit,¹²⁹ a clearly expressed intention to remove all restrictions on copying and distribution might appropriately be seen as effecting an abandonment of copyright. This would in turn insulate both the institution and its patrons against any attempt to employ copyright to restrict further use of the work. As we explain below, without a doctrine of abandonment, the terms of deposit could only be analysed as creating a revocable bare licence and hence there is a danger that some time (perhaps many decades) after the donor has died a surfacing heir may seek to enforce copyright.¹³⁰

¹²⁷ See, eg, *Hadady Corporation v Dean Witter Reynolds Inc*, 739 F Supp 1392 (CD Cal, 1990) (intent to abandon inferred from notice which indicated that the plaintiff intended to relinquish its claim to copyright two days after publication).

¹²⁸ See, eg, *Oravec v Sunny Isles Luxury Ventures LC*, 469 F Supp 2d 1148 (SD Fla, 2006) (copyright abandoned as a condition of entering architectural competition).

¹²⁹ In particular, it would have to be borne in mind that in many cases a desire to restrict access for a period and then to allow more general access will be motivated solely by considerations of privacy.

¹³⁰ It is worth emphasising two further points in relation to this example. First, it would not generally be possible to analyse the act of deposit as transferring copyright to the institution. Dealings with tangible copies do not normally effect any transfer of copyright and courts have been loath to recognise an exception in the case of dealings with sole copies of a work: see, eg, *Seven Network (Operations) Ltd v TCN Channel Nine Pty Ltd* (2005) 222 ALR 569, 576 [37]–[38] (Lindgren J). It would be difficult to criticise the judiciary for holding this line given that Parliament has carved out a single exception from the general rule, namely, that where a copy of an unpublished work has been bequeathed to a person by the copyright owner there is a presumption that the owner also intended to effect an assignment of copyright in that person's favour: *Copyright Act 1968* (Cth) s 198. Secondly, the mere agreement by a cultural institution to take possession of a copy of a work would not normally be enough to constitute consideration, hence our conclusion that, analysed through a licensing lens, the terms of deposit would only create a revocable bare licence. Indeed, many institutions use acquisition forms titled 'Deed of Gift' that make it clear that rights are transferred for no consideration: see, eg, National and State Libraries Australasia, *Deeds of Gift: Guidelines for NLSA Libraries* (2010) <<http://www.nsla.org.au/publication/deeds-gift-guidelines-nsla-libraries>>. In the case of loans, the analysis will depend on what benefits were afforded the lender.

It is important to pause to consider how the scenarios sketched above would be treated in the absence of a doctrine of abandonment. In the case of dedications to the public the only alternative would be to treat the dedication as creating a general licence to copy and redistribute the work. As Johnson explains, analysed through a licensing lens a dedication to the public could only be treated as creating a bare and hence revocable licence. No consideration would have been given for its grant and hence the copyright owner could revoke it at will. There is neither statutory nor judicial authority to support the creation of a category of irrevocable bare licences.¹³¹ As a consequence, any well-informed actor that was thinking of investing in the distribution, translation or public performance of a work that had been dedicated to the public would have to be concerned about the implications of the licence being withdrawn. Admittedly, the doctrine of estoppel might provide some further protection for a user who had relied to his or her detriment on the terms of the licence. However, in the absence of detrimental reliance — for instance, where a user had become aware that the licence to use the work had been revoked prior to commencing the impugned activity — estoppel could offer no defence.¹³² Moreover, even in cases where the user is able to demonstrate detrimental reliance, the extent of the protection that estoppel would provide as regards future uses would be highly uncertain.

Consequently, a refusal to recognise a doctrine of abandonment would not only leave users exposed. It might also have a chilling effect on the circulation of works that have been dedicated to the public, which might run directly counter to one of the reasons why a copyright owner would seek to place a work in the public domain or donate it to a cultural institution on terms of unrestricted access and use. Moreover, further undesirable consequences may arise. For instance, in the absence of a doctrine of abandonment a term of a contract to the effect that competition entrants will ‘assert no claim to copyright’ could quite plausibly be regarded as creating either an assignment or an exclusive licence. This would leave the author in a significantly worse position than our preferred alternative — it is one thing to enter a competition on the basis that anyone in the world, including the author, might reuse the work, but it is quite another to transfer rights in the work to the competition organisers.¹³³

¹³¹ Johnson provides a detailed defence of this analysis in the context of English law and concludes that the position in Scotland is in substance the same, despite the fact that Scots law is much quicker to give legal effect to unilateral promises: Johnson, above n 66, 605–8.

¹³² *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 404 (Mason CJ and Wilson J), 429 (Brennan J), 443 (Deane J), 458 (Gaudron J).

¹³³ *Oravec v Sunny Isles Luxury Ventures LC*, 469 F Supp 2d 1148 (SD Fla, 2006) is again instructive. This case concerned architectural plans that had been entered into a competition. A term of the competition was that the author not assert any copyright to the entered plans. At issue in the case was not only copyright in the entered plans, but also copyright in later plans that incorporated elements from the entered plans. To be clear, the point we are making here is that abandonment allows the reworking of a work by its author (with the possibility of obtaining copyright in the new derivative work). In contrast, if a competition term were analysed as creating an assignment or an exclusive licence the author would be forced to seek permission for the copying of any substantial part of the work. Admittedly, Australian law, like the law in a number of Commonwealth jurisdictions, has a provision that allows artists to reuse design motifs from works in which copyright has been assigned: *Copyright Act 1968* (Cth) s 72. But even taking this exception into account a doctrine of abandonment is still much more protective of authors, not

There are, therefore, certain factual scenarios that to our mind demand recognition of a doctrine of abandonment. Acceptance of the idea that copyright can be abandoned is especially important for works that have been dedicated to the public domain, particularly at a time when Johnson's argument to the contrary is proving influential.¹³⁴ The types of scenario we have canvassed also point to some obvious situations in which a doctrine of abandonment might prove useful in dealing with the problems associated with orphaned works. This is particularly true in circumstances where a copyright owner has deposited a unique copy of a work on terms that suggest an intent to abandon.

Thus far we have been considering scenarios in which there is an express statement that evinces an intent to abandon (even if the specific terminology of abandonment is not used). Beyond this type of case, however, we want to suggest that there might also be cases where the intent to abandon can only be inferred from the copyright owner's conduct and the surrounding circumstances. If correct, this would have further important implications for the law's treatment of copyright in orphaned works. The starting point is to consider how the requisite intention is to be discerned. The authorities considered earlier in this article strongly suggest that intention should be judged objectively. This approach finds support in *Robot Arenas*, where a set of observable facts were seen as going to the question of whether an intent to abandon had been formed.¹³⁵ It is also the approach adopted in the US cases dealing with the abandonment of copyright where, for example, language that clearly evinces an intent to abandon has been given priority over later declarations that no subjective intent to abandon had been formed.¹³⁶ Commentators who are supportive of the doctrine also generally accept that an objective analysis of intention is to be preferred. For example, Fisher (writing in relation to chattels) argues that intention should be judged by reference to an open-textured list of factors.¹³⁷

An objective assessment of intention opens the possibility of inferring the relevant intention from the copyright owner's conduct in appropriate circumstances, in particular where the owner has signalled that he or she no longer has any interest in the core rights of reproduction and distribution. In the case of orphaned works held by cultural institutions, we would suggest that this means that abandonment might be established in cases where an institution has taken possession of an item that would otherwise have been destroyed and that

only because of its application to all types of work, but also because s 72 preserves a quantitative and qualitative limit on the amount of a work that can be copied — the artist is not allowed to 'repeat or imitate the main design'.

¹³⁴ See, eg, Corbett, above n 105, 519, drawing on this aspect of Johnson's analysis without adverse comment.

¹³⁵ [2010] EWHC 115 (QB) (8 February 2010) [87] (Mr Edelman QC). Significantly, whilst the defendants reached the incorrect conclusion that there was no-one interested in the equipment left behind in the relevant premises, they were not liable in conversion for destruction of that equipment because their efforts to determine ownership were reasonable in the circumstances: at [15]–[23].

¹³⁶ See, eg, *Hadady Corporation v Dean Witter Reynolds Inc*, 739 F Supp 1392, 1399 (Bonner J) (CD Cal, 1990).

¹³⁷ Fisher, above n 26, 135 [4.71].

provides a unique record of a work. In order to justify this conclusion consideration needs to be given to whether the intent to abandon can be inferred from the act of disposal. In order to address this issue we need to consider a number of subsidiary questions: what is the relationship between disposal and abandonment in the case of chattel property? Should throwing out a chattel invariably or presumptively be seen as abandonment? In the case of copyright, can we garner evidence of such an intention from the disposal of the chattel in which copyright subsists? Given it is trite law that property in the tangible embodiment and copyright are separate and can be held by different people, what if anything can be drawn from the apparent abandonment of the former? These are by no means hypothetical questions, being close to the hearts of many museums and archives who often take possession of items that would otherwise have been destroyed, and that have at times resorted to salvaging important items from garbage cans and dumpsters.¹³⁸

Working through the above questions, it is notable that in *Re Jigrose*, Kiefel J took the view that: 'As a general proposition, if I throw something away I truly abandon it. I intend no longer to retain possession. I do not propose to seek it out and I have no further interest in ownership.'¹³⁹ This indicates that the act of disposing of a chattel might create a presumption of abandonment, a rule of thumb that encourages the reuse of discarded property in a way that is, to our mind, entirely appropriate. What we want to suggest is that there are also cases in which the same presumption can be extended to copyright works that are embedded in the article that has been discarded.¹⁴⁰ In our view, there are some forms of disposal that naturally suggest that the person is actively divesting themselves of all future property claims, both tangible and intangible. However, this is an idea that needs to be handled with care. It must be emphasised that even as regards chattel property the conclusion that disposal brings with it an intention to abandon can only ever be a 'general proposition' (as Kiefel J recognised). Sometimes when we dispose of an item we have a definite intention that it is to be destroyed. To take a straightforward example, when confidential paperwork is set aside and handed over to a waste disposal firm that has contractually undertaken to destroy all such material, it is clear that the paperwork is being handed over for a limited purpose. In such a case the waste disposal firm becomes a bailee of the paperwork,¹⁴¹ not its owner, and should the

¹³⁸ See, eg, New Yorkled, *Salvaged Stories: Lives Revealed from the MoCA Collections* <http://www.newyorkled.com/Past_Event_Moca-Salvaged-Stories.htm> (discussing salvaged items held in the collection of the Museum of Chinese in the Americas).

¹³⁹ [1994] 1 Qd R 382, 385.

¹⁴⁰ To be absolutely clear, we are only suggesting that abandonment of copyright might be inferred where the person disposing of the chattel is also the owner of the copyright.

¹⁴¹ It being remembered that a bailment can arise even though there is no expectation that that bailee return the goods to the bailor nor deliver them to a third party: *Palmer on Bailment*, above n 22, 3-6 [1-003]-[1-004].

waste disposal firm fail to destroy the paperwork the other party could seek its return.¹⁴²

It is here that the possibilities and limits of abandonment start to become clear. To start with the negative case, it is clear that an intention to destroy a chattel would have to be treated as excluding abandonment of any associated copyright. Thus, to take an example drawn from a case that recently came before the Supreme Court of Denmark, if it is clear that an artist intends that a canvas on which a work has been painted be destroyed there can be no argument that he or she has abandoned copyright in the work.¹⁴³ Even clearer would be a case where the item disposed of was an early draft, preliminary sketch or the like, and the owner has gone on to exploit or retain a later version. Ongoing privacy considerations would also often weigh heavily against abandonment. The disposal of a computer would therefore be highly unlikely to create a presumption of abandonment in any of the data stored therein, since some such data might well be confidential. These examples can be contrasted with the case of a television company that wishes to discard the only extant copy of a set of old newsreels. Should these newsreels be offered to a cultural institution on the basis that the television company has no further interest in them and the tapes will otherwise be destroyed, there would be a strong case for inferring an intent to abandon. In a similar vein, we would suggest that if the newsreels are thrown into an uncovered skip during building renovations and the company has not retained a copy, nor otherwise taken any steps to indicate that they retain an interest in the newsreels, abandonment should again be inferred, extending not merely to property in the reels themselves, but also in the associated copyrights.

Ultimately, however, even when one takes into account situations in which an intent to abandon can reasonably be inferred, the doctrine of abandonment can only be taken so far. The US cases have emphasised that intention must be gleaned from some positive act such that mere silence or inaction will generally not be sufficient.¹⁴⁴ This accords with the contours of abandonment as it has been described in British Commonwealth cases dealing with the doctrine generally: that although particular language is not required, even an objective test of intention requires evidence that would suggest an actual intention to abandon.¹⁴⁵ This would seem to shut down any argument based on a broad notion of ‘constructive’ abandonment — the development of a broader doctrine would require a considerable extension of the law and might well have undesir-

¹⁴² The original owner of the paperwork might have a number of other options, including seeking specific performance, but if the waste disposal firm has gone into liquidation the easiest and safest option might be to secure return of the paperwork and an alternative means of disposal.

¹⁴³ See Lisa Webster, *New Supreme Court Judgment Strengthens Copyright Protection of Artists' Works* (15 July 2010) International Law Office <<http://www.internationallawoffice.com/newsletters/detail.aspx?g=a00a07f7-38e4-4a3e-ac83-91b9f2774952>>.

¹⁴⁴ See, eg, *Hampton v Paramount Pictures Corporation*, 279 F 2d 100, 104 (Hamley J for Barnes, Hamley and Jertberg JJ) (9th Cir, 1960).

¹⁴⁵ See, eg, *Moorhouse v Angus and Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700 (failure to inquire about manuscripts given to publisher not evidence of intention to abandon); *Moffatt v Kazana* [1969] 2 QB 152 (discussed at above n 43, distinguishing abandonment from mere forgetfulness in relation to a tin of money accidentally left in the roof of a house).

able consequences, particularly if applied to all forms of property.¹⁴⁶ However, it may be that there are other techniques that a court might employ in order to limit an owner's right of action in a case where he or she has been inactive or delayed in enforcing his or her rights.¹⁴⁷

Given the need to demonstrate intention, it is unsurprising that cultural institutions in the US still report problems with orphaned works.¹⁴⁸ Abandonment should not therefore be seen as a panacea to the orphaned works problem and any comprehensive solution will inevitably require legislative intervention. This does not, however, mean that the doctrine of abandonment can be dismissed as a mechanism for dealing with problems associated with orphaned works. As we have tried to indicate, there are scenarios where a doctrine of abandonment might be of real assistance to cultural institutions. In the absence of a more comprehensive statutory solution, at least abandonment goes some way towards meeting the needs of cultural institutions and their patrons. Moreover, when one is thinking about the potential importance of abandonment, it is crucial not to look at this issue merely by reference to the narrow measure of the likelihood of a case going to trial and being decided in a cultural institution's favour as a consequence of the application of the doctrine of abandonment. As always when thinking about the likely consequences of the introduction or solidification of a legal rule, it is important not to become trapped by the 'leading case' fallacy. Attention must also be given to how the rule will play out in the life of the law more generally. If a case involving an orphaned work did come to be litigated, the mere fact that the defendant could seek to rely on an abandonment argument might impact on the ultimate outcome — even if the abandonment argument was not particularly strong, the plaintiff would have to take the possibility of success into account, perhaps encouraging the owner to reach a negotiated settlement.¹⁴⁹ A clearly established doctrine of abandonment might also offer other indirect benefits. If it came to be accepted that abandonment applies to remove copyright protection from certain categories of orphaned work, this might well impact on what a future legislative solution looks like. Parliament invariably takes the state of the existing law as its baseline when crafting interventions in the copyright field.¹⁵⁰

¹⁴⁶ See also Pamela Brannon, 'Reforming Copyright to Foster Innovation: Providing Access to Orphaned Works' (2006) 14 *Journal of Intellectual Property Law* 145, 162–4.

¹⁴⁷ There is some authority for this in *Robot Arenas* itself, where the technique used by Mr Edelman QC was to recognise a reasonableness defence to the (normally strict liability) tort of conversion, such that the defendants were successful even in the absence of the abandonment claim being made out: [2010] EWHC 115 (QB) (8 February 2010) [89]–[97].

¹⁴⁸ United States Copyright Office, above n 9, 21–2.

¹⁴⁹ Cf Robert P Merges, 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations' (1996) 84 *California Law Review* 1293 (discussing the relationship between the risk of having rights declared void and bargaining incentives).

¹⁵⁰ In Australia the best recent example is provided by the amendments that were made to the anti-circumvention provisions of the *Copyright Act 1968* (Cth) in the course of implementing the *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005). The amendments were crafted in such a way as to preserve the thrust of the High Court's decision in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193. For further explanation and analysis see Robert Burrell and Kimberlee Weatherall, 'Exporting Controversy? Reactions to the Copyright Provisions of the *US–Australia Free Trade*

If the existing law were understood to contain a mechanism whereby institutions could deal freely with a subset of orphaned works, this might well help shape a more generous legislative regime in the future.

IV CONCLUSION: PROPERTISING INTELLECTUAL PROPERTY

There are good arguments that the law of abandonment has been solidifying in relation to chattels over recent years. There are also strong grounds for concluding that some forms of proprietary interest in intangibles can be abandoned, in particular the common law proprietary interest created through first use of a trade mark. Consequently, by building on abandonment cases relating to chattel property and to trade marks and by drawing on a small body of copyright cases from the British Commonwealth that suggest abandonment of copyright is possible and US cases to similar effect, we have concluded that abandonment can play a role in the law of copyright. We are not convinced that Australia's international obligations, the *bona vacantia* doctrine, the inalienable nature of moral rights or the fact that rules on re-ownership would differ as between copyright and chattels preclude the recognition of such a doctrine. If the possibility of abandonment of copyright is accepted this would help clarify that dedications to the public domain do not, as has recently been argued, merely create a bare licence that is revocable at will. However, we have gone further and suggested that the doctrine of abandonment might apply in some orphaned works cases. Although abandonment would not solve the orphaned works problem, it would likely be of some direct assistance to libraries, archives and their users and might further help these groups in other less direct ways.

In light of our analysis of the role that abandonment might play in copyright law, we would like to end by making three more general observations about the possible utilisation of other concepts from chattel property to inform the scope of copyright. First, acceptance that copyright can be abandoned might allow us to look more creatively at how other doctrines within the law of personal property might be used to limit the reach of intellectual property rights. Abandonment is a consent-based mechanism for losing rights and, as such, its reach is inevitably limited. However, there may be cases in which other doctrines can do the heavy lifting. We might, for example, look more creatively at estoppel-based arguments. In other cases we might look at the law of accession — that is, the rule of personal property law that property rights can become lost where a lesser form of property becomes attached to a greater form of property, with the effect that the lesser property right becomes subsumed.¹⁵¹ This example illustrates that prop-

Agreement: Lessons for US Trade Policy [2008] *University of Illinois Journal of Law, Technology & Policy* 259, 300.

¹⁵¹ See Bridge, above n 28, 106–8. To develop this point, we believe that there is a good argument that the law of accession should apply to prevent farmers from being sued for patent infringement in cases where a genetically modified crop is adventitiously present on their land (for example, as a result of pollen being blown or carried by insects from a neighbouring property). See, eg, Maria Lee and Robert Burrell, 'Liability for the Escape of GM Seeds: Pursuing the "Victim"?' (2002) 65 *Modern Law Review* 517, 525–7 (discussing the Canadian case *Monsanto*

erty-based limitations on intellectual property rights would not necessarily be linked to the owner's state of mind (as with abandonment) or prior conduct (as with estoppel).

Secondly, a meaningful engagement with property doctrine might lead us to other revelations. We might, for instance, come to recognise that the outcome in *Fisher v Brooker*¹⁵² — in which it was held that a musician could enforce a claim to co-ownership of musical copyright some 38 years after the work was created — was not an inevitable consequence of affording respect to copyright as a species of property right. Rather, it was a product of the unsatisfactory way in which the English (but possibly not the Scottish)¹⁵³ statute of limitations was drafted.¹⁵⁴

Finally, to return to our most general theme, we need to challenge the assertion that respecting the proprietary status of intellectual property means that we have to afford owners more expansive rights. Many people who call for a more expansive copyright regime align this with the view that copyright is a form of property, and that property rights are strong, enduring and immutable. This article has sought to show that this perspective rests on questionable foundations. Indeed, we would go as far as to suggest that when rights in chattel property are mapped onto intellectual property rights, it is hard to avoid the conclusion that some of the excesses of our current intellectual property system are caused precisely by our failure to treat intellectual property rights like other forms of personal property.

Canada Inc v Schmeiser [2004] 1 SCR 902 and arguing that the Court at first instance should have taken the defendant's admixture argument much more seriously).

¹⁵² [2009] 1 WLR 1764.

¹⁵³ But see Hector MacQueen, 'Abandoned, Orphaned or Property for Ever? Copyright, Prescription and Personal Bar' (2010) 14 *Edinburgh Law Review* 97.

¹⁵⁴ See also David Vaver, 'Recent Copyright Law Developments: More Reform?' (2010) 22 *Intellectual Property Law Journal* 103, 108–9 (expressing concern about the outcome in *Fisher v Brooker*).