

An Illegal Adoption? – What Future for Fair Use in Australia

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Introduction

There are times during the discussion of what apparently ails Australian copyright law when one could be forgiven for thinking that everything would be ok if only our legislators could be persuaded that a United States-style fair use exception should find its way into our law.

Then, the thinking goes, whatever other problems Australian copyright law might have, at least we would have a user exception which was flexible and able to deal with the myriad of potential 'fair' uses of copyright works in the digital age, rather than being hamstrung by the century-old carryover of analogue-inspired fair dealings, summed up more than anything else by its reliance on strict categories of use.¹

Whether the thinking is sound is moot, because despite the recommendations of the Australian Law Reform Commission Final Report², there seems little likelihood that a fair use provision will be enacted any time soon. The current Attorney-General has described the recommendation as "controversial", and upending more than a century of Australian jurisprudence around fair dealing in favour of the American alternative may be a bridge too far.³

So will that be it for fair use? A whirl of optimism around the release of the ALRC's original discussion paper⁴— the very fact of fair use being canvassed as a possibility seemed to arouse excitement — followed by its actual recommendation in the final report⁵, and then the steady leaking of air from the balloon of optimism as it dawned on advocates of reform that possibly, maybe even likely, the recommendation would join a long line of others that never saw the legislative light of day.⁶

This paper explores whether, in the absence of a legislated fair use, the practice of adopting 'fairness' standards to paper over the disconnect between what enabling technologies permit and fair dealing allows, amounts to fair use by stealth, or fair use without the statutory protection, to put a pessimistic spin on it.

After all, the theme of this conference is "On the Edge". Is that destined to mean always on the edge of law reform — i.e. fair use — but it always being tantalisingly out of reach, or maybe instead it can mean operating on the edge of developing norms, following accepted principles of 'fairness' and applying them in new ways. The edge of lawlessness, surely not, but maybe instead the edge of technological and copyright innovation.

¹ The Copyright Act 1912 (although not the first Australian Copyright Act), deemed the Copyright Act 1911 U.K. to have force in Australia, including its fair dealing provisions.

² Tabled in Parliament on 12 February, 2014

³ Commonwealth of Australia, Senate Debates, 12 February, 2014

⁴ Copyright and the Digital Economy Discussion Paper, released 6 June 2013

⁵ Recommendation 4-1

⁶ The Copyright Law Review Committee recommended a fair use defence in its 1998 report, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners*)"

Living on the Edge

I attended a copyright seminar some years ago, which was hosted at the National Library. Attendees included the 'usual suspects' – i.e. the educational, library and cultural sectors – but this was much more than a periodic discussion about the problems 'we' faced with copyright and what we'd like done to fix those problems. Also in attendance were representatives of the copyright section of the Attorney-General's Department and major players on the content side. Google, as I recall, gave a presentation.

A key issue up for discussion that day was the potential liability of content providers – not ISPs – for the copyright breaches of their users, content providers not being offered in Australia the 'safe harbour' protection of ISPs, unlike their counterparts in the U.S. The issue was particularly topical because the Full Federal Court had recently handed down its decision in the iiNet Case⁷, where it examined the law of authorisation⁸.

The telling part of the discussion came after a long period of questions and comments, most of which focussed on 'what is the government going to do to fix the problem of the uncertainty and potential liability. The senior representative for the Attorney-General's Department was quite clear – you should sort it out for yourselves. You should not look to the government to legislate for every copyright problem that you have. Given time, many of your 'problems' are best resolved by new ways of doing things, new business models and, where necessary, agreed non-legislative standards.

The view, at some levels, make sense – instead of imposing legislated solutions upon parties, try to get the parties to evolve their behaviours, relationships and, where necessary, business models, without legislation. While the spectre of anti-piracy legislation hasn't gone away, we have seen plenty of examples in the last decade where copyright owner and user behaviour has evolved – YouTube, frequently decried in its early days as a repository of stolen content, has come to be seen by many major content owners as a great showcase for snippets and outtakes that are not loaded with their permission. YouTube and content owners can choose to interpose an advertisement before that content, thereby effectively 'monetising' the breach. The music industry has rapidly evolved its content offerings – a decade ago, much of the focus was still on selling CDs in shops, while trying to shut down peer-to-peer music websites⁹ - while now there exist a raft of competing online music subscriber services offering music content in a way almost unimaginable just a few years ago. Of course, the content owners still want to kill off the pirates, and still lobby government to legislate¹⁰, but owners and consumers haven't sat on their hands waiting either.

Living on the edge, for the educational, library and cultural sectors, possibly means taking the Attorney-General Department's thought bubble at face value – you can wait for a legislated solution (fair use) or you get on and try to come up with solutions anyhow. Those solutions – without express

⁷ Roadshow Films Pty Limited v iiNet Limited [2011] FCAFC 23

⁸ The circumstances under which a party can be held liable for the copyright breaches of a third party – e.g. where they have provided the means by which a copyright breach has been enabled.

⁹ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)

¹⁰ <http://www.billboard.com/articles/business/6397825/australias-govt-starts-clock-on-isps-anti-piracy-code>

legislative backing – involve uncertainty and risk, but isn't that what the sectors have been grappling with for the last decade or more?

The case for fair use, courtesy of the ALRC

We are fortunate that the ALRC has so very recently taken many submissions on this topic and prepared and delivered such a thorough and well-reasoned report. That report contains, in great detail, the many arguments raised both for and against the adoption of a fair use defence in Australia.

But first, the obvious question. What is it? There are many formulations, but this one is simple and accurate:

“Fair use is a statutory provision that provides that a use of copyright material does not infringe copyright if it is ‘fair’, and that when considering whether the use is fair, certain principles or ‘fairness factors’ must be considered.”¹¹

Where does it come from? Well, almost invariably discussions of fair use are referring to the codified version in the U.S. Copyright Act, s.107 of which provides:

“...the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(2) The nature of the copyrighted work;

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) The effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”¹²

Of course, fair use is much, much more than that. It is also about jurisprudence going back to the mid-19th century¹³ and a legislative and *“a complex web of understandings, agreements and policy statements [that] support the legislative provisions.”¹⁴* Burrell and Coleman, in a particularly detailed, disinterested and dispassionate analysis of the issues surrounding the possibility of introducing fair use into the U.K., were particularly left in doubt by the likely judicial response to a U.S.-style fair use, and whether it would be interpreted in the generous, open and adaptable way that many assumed it would and should be.

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¹² Digital Millennium Copyright Act (U.S.)

¹³ *Folsom v. Marsh*, 9. F.Cas. 342 (C.C.D. Mass. 1841)

¹⁴ Burrell and Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press, 2005

Although the ALRC widely canvassed the arguments for and against, ultimately it felt there was a compelling case in favour. Important factors which informed its thinking included:

- *Fair use is flexible and technology-neutral.*
- *Fair use promotes public interest and transformative uses.*
- *Fair use assists innovation.*
- *Fair use better aligns with reasonable consumer expectations.*
- *Fair use helps protect rights holders' markets.*
- *Fair use is sufficiently certain and predictable.*
- *Fair use is compatible with moral rights and international law.*¹⁵

Notoriously difficult to put accurately into words, noted American jurist Pierre Leval's 1990 formulation of the concepts of fair use and fairness was turned to for guidance by the ALRC:

"I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. ...[I]f the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society."

*Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses."*¹⁶

It was the view of the ALRC that the category-based system of fair dealings was, effectively, a yolk around the necks of copyright users.

Fair Use Standards – not really 'foreign at all'

*"Far from being a 'radical' exception, fair use is an extension of Australia's longstanding and widely accepted fair dealing exceptions. The principles encapsulated in fair use and fair dealing exceptions also have a long common law history, traced back to eighteenth century England."*¹⁷

The truth is that we are already quite used to approaching copyright questions of what to use, how much and in what circumstances in a fair use-like way. Not exactly the same, but in a very similar way, at least within the permitted categories of fair dealing, because we are required to adopt 'fairness' standards in determining whether our category-based fair dealing – e.g. criticism and review – is 'fair'.

It is 'second nature' for persons in the educational, library and cultural sectors to default to the fairness principles which underlie – in remarkably similar guises – in both the American and Australian systems.

¹⁵ ALRC Report 122, Executive Summary

¹⁶ Leval, P 'Towards a Fair Use Standard', 1990 103 *Harvard Law Review* 1105

¹⁷ ALRC Report 122, para 4.31

As emphasised in the Report, fair dealing is always a two-step process – first, it must be “fair” and it must also be for one the prescribed purposes. The Copyright Act 1968 goes on to expressly enumerate, for example in relation to fair dealing for research and study of a literary work, the fairness factors to be considered:

“(a) the purpose and character of the dealing;

(b) the nature of the work or adaptation;

(c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;

(d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and

(e) in a case where part only of the work or adaptation is reproduced—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.”¹⁸

Considered side by side with the enumerated fair use ‘fairness’ standards of s.107 of the U.S. Act, there is fundamental and remarkable similarity:

- *“The purpose and character of the use” (U.S.) and “the purpose and character of the dealing” (Aust);*
- *“The nature of the copyrighted work” (U.S.) and “the nature of the work or adaptation” (Aust);*
- *“The amount and substantiality of the portion used in relation to the copyrighted work as a whole” (U.S.) and “in a case where part only of the work or adaptation is reproduced—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.” (Aust);*
- *“The effect of the use upon the potential market for or value of the copyrighted work.” (U.S.) and “the effect of the dealing upon the potential market for, or value of, the work or adaptation” (Aust).*

As much as Pierre Leval’s statement of what are the key ingredients of fair use is an illuminating standard for interpreting the U.S. provision, the following passage from Lord Denning, in the context of the very similar U.K. fair dealing in the 1970s, is often referred to for guidance in interpreting the Australian provision:

“It is impossible to define what is ‘fair dealing’. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.”¹⁹

¹⁸ Copyright Act 1968 (C’th) s.40(2)

¹⁹ *Hubbard & Anor v Vosper & Anor* (1972) 2 QB 84

“Fair”, “unfair”, the analyses of fair use and fair dealing are littered with references to these opaque standards of behaviour. Paradoxically, the nebulous nature of ‘fairness’ is what is frequently used to decry the suitability of fair use to the Australian context – how much better the ‘certainty’ of fair dealing. ‘Certainty’ - how can that be, when the fairness standard is intrinsic to both fair use and fair dealing? Instead, the certainty for many opponents of fair use comes from the restricted categories of fair dealing’s permitted operation – e.g. research and study, criticism and review, parody and satire, reporting of news – which effectively corral the usefulness of the exception to targeted activities.

The ALRC took great store in the parallel ‘fairness traditions’, particularly seeing it as readily enabling Australian law, as well as copyright owners, users and the judiciary, to adapt to the new system with relative ease. It particularly noted:

“Fair use builds on Australia’s current fair dealing exceptions, retaining the focus on fairness, but removing unnecessary limitations to particular types of use and clarifying that important factors should be considered when assessing whether any type of use is fair.”²⁰

An Exception by any other name would smell so much sweeter

One of the difficulties with the expansion of fair dealing by, shall we call it, normative creep, is that it is very easy to fall prey to criticism that this is theft by another name. ‘Jumping the gun’ is a cliché that comes readily to mind. Partly, the issue is one of psychology – that fair dealing is an ‘exception’ to the rights of copyright owners, implying something which has clear limits and takes what otherwise would belong in the first instance to a copyright owner – i.e. the *absolute* right to control reproduction of their copyright work.

Burrell and Coleman, in their analysis of possible reform of U.K. fair dealing, see the need to renaming user “exceptions”:

“...new provisions should be styled as users’ rights, rather than ‘exceptions’, ‘defences’ or ‘permitted acts’ [and] although switching to the language of users’ rights may appear to be cosmetic reform, it is both politically and psychologically important. The problem with the more traditional formulation is that they help to create the belief that provisions provided for the benefit of users are somehow not a central aspect of copyright law, that they are ‘exceptional’. As such these formulations help reinforce the idea that provisions provided for the benefit of users must be framed and interpreted restrictively”²¹

Normatively, have we already adopted ‘fair use’ to fill in the gaps?

Applying ‘fairness’ principles beyond the safe categories of fair dealing is always going to be a challenge, whether it be to include limited quantities of in-copyright content in publicly available MOOCs courses – beyond the boundaries of statutory licences – or for inclusion in an online collection for a library or cultural institution, where there is, for example, no underlying criticism or review of the content to support its inclusion.

These seemingly prosaic usages of copyright materials beyond the bounds of fair dealing, are day-today examples of the use of enabling technologies to make content available to a worldwide

²⁰ ALRC Report 122, para 4.38

²¹ Burrell and Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press, 2005, at 279

audience. But can you or should you? Should pay or seek the copyright owner's permission in every case?

The difficulty posed by these decisions lies partly in the fact that many copyright owners try to monetise their content at a very granular level – i.e. you can pay for permission to reproduce a single image or graph, and you can do so instantaneously using an online form and payment system.

Having 'enabled' you to pay for any conceivable non-legislated use, the argument can run that there is simply no scope left for creeping norms to fill in the gaps between the 'legal' and the 'possible'.

On that basis, there is no scope for an extended fair use at all, but that seems founded on the hotly contestable notion that, as discussed by Burrell and Coleman, there are no user 'rights', just limited 'exceptions' that should remain tightly fenced. But this is not a proposition that sits with the idea of a so-called 'balance' between the rights of owners and users, and certainly does not find favour with the ALRC.

Once again, we go back to the proposition that both owners and users are in the process of evolving new ways of engaging with each other, and part of that engagement is the development of norms where users in the educational, library and cultural sectors, amongst others. The ALRC observed that "there is clearly an understanding among stakeholders that some infringing use of copyright material is 'fair enough' and other use is more egregious."²²

Determining what is fair or unfair, right or wrong, or fair enough or egregious is really difficult. No-one, including the ALRC, pretends otherwise. That said, the Commission was alive to the risks of doing nothing and having copyright laws that were routinely ignored or were markedly inconsistent with day-to-day norms.

*"Attempting to impose rules which clash with strongly established norms... [is a] way in which laws can be rendered meaningless."*²³

The Edge

In charting a path forward, we must be guided by fairness, but how?

Accepted or developing norms within our sectors are an excellent barometer of 'fairness', and our collective 'moral compass' can serve as a powerful guide, which is why the dialogue that occurs between professionals at conferences such as ALIA Online is so important.

The collective moral compass, which in its DNA includes elements of fostering education and the discussion and dissemination of ideas, does not seek to supplant legitimate copyright owner interests; it does not seek to profit from or compete with copyright owners; but it does seek to enforce part of copyright's most basic bargain – legislated rights for owners in exchange for legislated uses for users.

Our collective moral compass –and the evolving norms of behaviour that flow from that – are today about evolving those user rights to the digital age.

²² ALRC Report 122, para 3.34

²³ ALRC Report 122, para 3.27, citing Chris Reed, *Making Laws for Cyberspace*, OUP, 2012

That we have to do that with a fair amount of uncertainty is nothing new and, recalling the mantra expressed at that copyright seminar I discussed earlier, it's part of our lot – indeed, it's expected of us – that we sort it out for ourselves.
