An Illegal Adoption?
What future for fair use in Australia?

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“A rule of government is never look into anything you don’t have to, never start an enquiry unless you know what its findings will be.”

Sir Humphrey Appleby in the *Yes Minister* episode “The Whiskey Priest,” December 16, 1982

- The last couple of years has witnessed a lot excitement around the seemingly **imminent possibility** of an American-style fair use being introduced into Australian law.

- There seemed (and still seems) a lot of **logic** around the arguments for fair use – rather than the alternatives, including another round of tinkering with the permitted categories of fair dealing.

- Excitement turned to anticipation in many quarters when, in 2014, we got to see the Australian Law Reform Commission's recommendations in its most recent report.

- The ALRC recommended the introduction of an **American-style fair use**, an architecture of non category-based permissible exceptions to the exclusive rights of copyright owners.

- The ALRC noted that this was the **approach to be preferred** to the further expansion of fair dealing's current system of category-based exceptions. Fair use was:
  - Suitable for the digital economy and will **assist innovation**;
  - Provide a **flexible** standard;
  - **Coherent** and **predictable**;

- “The Committee is strongly of the view that an approach that seeks to deal with each specific case is undesirable. First, it cannot be comprehensive in its coverage because it is not possible to predict new uses to which the technological developments may give rise (or how they will affect copyright owners and users).”

- “Second, each new circumstance that needs to be dealt with simply adds to the complexity of the legislation…”

- “The Committee’s recommended model **simplifies the existing plethora of fair dealing provisions** and addresses the real limitations of the current provisions, which are that they are inflexibly linked to specific purposes and are difficult to apply to new technologies.”

- That “committee” was not, of course, the ALRC, and the emphatic and well-reasoned recommendation for introduction of fair use dates back to 1998.

- The Copyright Law Review Committee had a habit of developing well-reasoned copyright reform recommendations before it was finally wound up ten years ago.

- Then there was the **Attorney-General’s Department Issues Paper** from 2005, which invited submissions on fair use to inform Government policy on the matter.

- The 2005 Issues Paper embraced a predictable theme:
  - *"The Government will analyse the information and views provided in the submissions carefully and make a decision on whether the Copyright Act should be amended. If there is a need for legislative change, the Government will consider further consultation on that legislative change before introduction."*
- A cynic might argue that the most **recent fair use reference** to the ALRC, with the final report deliverable to a future government, not the one that requested it, was just another in a line of well-reasoned excursions into legal fantasy. A lovely document, but without much hope of legislation.

- It is easier for governments to talk about copyright reform than it is to implement it.

- The **competing interests** and attitudes in copyright matters seem to be **more entrenched** than ever – as much as new technologies offer unprecedented opportunities to educational, library, archive and cultural sectors, so too the copyright owners are seized with their own views of new opportunities…and threats.

- All this makes copyright law reform contentious and difficult for government.

- The Kevin Rudd government found itself at the centre of two very punishing and **politically unrewarding conflicts** when it sought to legislate on the fairly narrowly defined copyright areas of parallel importation of books and resale royalties for artworks.

- In both cases, it found itself in a crossfire that cut across political lines - authors, artists, publishers, bookstores, book buyers, galleries, auction houses…it was hard to find any bipartisan ground.

- Also, successive governments were happy for the issue of ISP liability for copyright breaches by users to wend its way unsatisfactorily all the way to the High Court, where it was bluntly observed that *"pressures for change to accommodate new circumstances are best resolved by legislative processes rather than by any extreme exercise in statutory interpretation by judicial decisions."*

- Inevitably, albeit very reluctantly, the issue of ISP liability has ended up in the lap of government, which has just as quickly ushered it off into the hands of ISPs and content owners so they can come back with industry "code of practice".

- **Australian governments – of all colours and stripes – do not legislate on copyright with a glad heart.** If 'twere best left undone, it will be…

- Which brings us to fair use. If we assume – correctly or otherwise – that we will not be turning to the 'fair use' section of the Copyright Act 1968 in the foreseeable future, where does that leave us?

- Potentially – probably, inevitably – the current Act will be amended to add to the current suite of category-specific fair dealings. Canada and the U.K have both done so, and the ALRC 'fall-back' position is to do the very same.

- These are the categories of the ALRC's new fair dealing provision:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) professional advice;
- (f) **quotation**;
- (g) **non-commercial private use**;
- (h) **incidental or technical use**;
- (i) **library or archive use**;
- (j) **education**; and
- (k) **access for people with disability**.

- Even some of these are likely **unachievable**… Fair dealing for **education** would essentially take the place of the fair use which permits "multiple copying for classroom use" in s.107 of the U.S. statute, but which is 'catered for' by the *pay-for* statutory licenses in Australia.

- The ALRC doesn't call for the abolition of statutory licences – rather, making them more flexible - but fair dealing for education would largely supplant those licences, leaving a rump that provided a pay-for structure for reproduction beyond fair dealing limits.

- Between the school, TAFE and tertiary sectors, that's the better part of a $100 million that currently is channelled to copyright owners, and it would take a braver government than most to accept the ALRC's suggestion to even consider it, let alone legislate it.

So Australian Fair Use is dead?

- As a legislated creature, yes, but not as a set of *familiar* principles - **fairness principles** - that we can use to bridge the inadequacies and incompleteness of Australian copyright law.

- To those who say that **we must comply strictly with black letter law**, that's not a view shared even by copyright lawyers – nor the A-G's Department - who recognise that legislation often lags years, even decades, behind circumstances that require practical solutions to day-to-day situations never contemplated by legislative draftsmen.

- In **forging practical solutions**, we must always **comply with the spirit and intent of the legislation** – what are the principles that it embodies?

- It’s not just a one-sided consumer- or user-driven set of norms that are being created in the copyright space.

- Instead of imposing legislated solutions upon parties, **Governments routinely try to get the parties to evolve their behaviours, relationships and, where necessary, business models, without legislation** - e.g. is the best way to deal with music piracy to offer a compelling new music product that marginalises piracy sites, or simply prosecute the downloaders?

- 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.

- **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**.

- Call it **papering over the law-norm gap**, but we do it all the time. In the case of copyright, we at least have a recognised set of guiding principles that even the ALRC accepts.

- *“**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.” (ALRC)*

Fair dealing and fair use share a central core

- *"**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." (ALRC)*

- 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 out 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.

- 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 with Australia's fair dealings:
- *"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).*

- “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.

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.

A change of mindset

- *"…**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." **(Burrell and Coleman)***

- Changing the language or changing the mindset, **we do need to embrace *non-legislative* copyright development**.

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-to-day examples of the use of enabling technologies to make content available to a worldwide 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 or 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.”**

- 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.

- The ALRC cited with approval the following observation by Chris Reed, a U.K. scholar:

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

- This is **not** a charter to create a new copyright reality on the ground and that claim it as the new norm. That, without more, would be **a charter for copyright larceny**. That would be Grokster, Napster, etc.

- But a new reality on the ground, the **shaping of new copyright norms consistent with long-established fairness principles**, and using those fairness principles to navigate the gaps in copyright law and practice, is **not lawlessness of any kind, but simply the accretion of practices and *solutions* that typically precede legislation**…so long (I repeat) so long as they are consistent with the underlying principles that inform and shape that area of the law.

Feeling for the edge

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

- **Accepted or developing norms within our sectors are excellent barometers 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 Information Online is so important.

- The collective moral compass, which in its DNA includes elements of fostering education and the discussion and dissemination of ideas, **doesn't seek to supplant legitimate copyright owner interests**; it doesn't 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.

- Examples abound for where ‘fairness’, evolving norms and enabling technologies interplay.

- **Orphan works** – where a copyright owner cannot be identified or contacted – **are a type of copyright content which frequently require walking that ‘edge’ and balancing the benefit of use**, the ‘harm’ to unknown or uncontactable copyright owners, and the risks and rewards of proceeding.

- Fortunately, part of the **development of norms is aided by industry and professional groups pondering the issues**, bringing out their 'fairness' compass and disseminating what they've divined by offering advice and, possibly, guidelines.

- **IFLA**, the International Federation of Library Associations, and **NSLA**, National and State Libraries Australasia, are examples of just such engagement.

- The latter, in 2011, released a very important **normative statement** on the issue of orphan works, turning specifically to the practical question of what do librarians do at the coalface…

- **NSLA *Position Statement on a reasonable search for orphan works*:**

  - *"In practice, a **reasonable search** will involve a **continuum of effort** ranging from minimal through to an extensive or extraordinary search. On this continuum, a greater level of resources and professional expertise will be required to locate the copyright holder of recent and/or works created by professionals as these searches have a higher likelihood of success. Prominent use of a work or a use that would be difficult to rescind or take down will also require greater search efforts."*

- The **fairness matrix** is embodied in this approach. It tries to juggle the worthwhile outcome of, for example, digitising and making available an unavailable work, with how recent and/or commercial is the work and the downside practical difficulties of what to do if it later needs to be taken down – e.g. the copyright surfaces.

- The ALRC made much of the need to see how norms and practices develop in this field, and not to be too prescriptive. A ‘watching brief’ and a call for “further consultations with stakeholders” was an implicit acceptance of taking note of developing norms and using them as guideposts to legislation, the development of an ‘orphans’ register, etc.

- **Evolving norms** can sometimes be **divined in the legislation of other jurisdictions** – Canada with its fair dealing for “non-commercial, user-generated content”:
  - *“It is not an infringement of copyright for an individual to use an existing work…which has been published…in the creation of a new work…in which copyright subsists and for the individual…to use the new work…or to authorize an intermediary to disseminate it.”*

- Sometimes referred to as Canada's "mashup" section, it's a great example of **black letter law that has evolved out of the widespread norm** of people mixing and remixing content and uploading to the result to a variety of non-commercial electronic homes, including social media. It's a small step, but an important one…

- We will eventually see black-letter law in Australia that realigns the owner and user relationship in the 'fairness of use' space and hopefully it will mirror many of the recommendations of the ALRC, but in three years, five years, when?

- That's where we are now. It's frustrating and sometimes stressful, but compared to the 'certainty' that came with an overwhelming lack of user capacity in the pre-digital age, **it's a useful kind of uncertainty**.

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