

COPYRIGHT LAW IN THE DIGITAL AGE: TECHNOLOGY COMPANIES MEGABYTE BACK AS AUSTRALIA’S FAIR DEALING PROVISIONS LAG

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I INTRODUCTION

The term of copyright protection for most works in Australia is more than 70 years and far exceeds the amount of protection required to incentivise the creation of new works.¹ For example, a 35-year old author who produces work in 2016 and lives to 85 years will have copyright protection until 2136.² This excessive duration of protection costs the community and restricts access to existing works. Technology companies, such as Google and Facebook, are becoming increasingly frustrated with Australia’s restrictive legal climate for innovative ideas.³

Currently, Australia’s copyright laws adopt a ‘fair dealing’ defence to copyright infringement. Sections 40 to 43 of the Act set out limited exceptions to the exclusive rights granted to creators. This article examines why these exceptions are too narrow and inflexible, do not accurately reflect the way people use content in the digital world and do not allow judges the flexibility to

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¹ Australian Government Productivity Commission, *Intellectual Property Arrangements – Copyright* (2016) <<http://www.pc.gov.au/inquiries/current/intellectual-property/draft/copyright-factsheet.pdf>>.

² Ibid.

³ Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) 105.

assess individual cases on the merits. In contrast, the 'fair use' exception utilised in the US essentially asks, 'was this particular use fair?' The statute does not provide a definition but rather guides the judge with a series of factors to be utilised on a case-by-case basis. The author suggests the introduction of a fair use-style defence as adopted in US Copyright Law and as suggested by the Australian Productivity Commission into Australian law.

II AN OVERVIEW OF COPYRIGHT LAW IN AUSTRALIA

The law of copyright seeks to balance the rights of authors to protect creative work and recover commercial benefits with copyright users, who seek to use existing works to build and create new works.⁴ The challenging task of finding the appropriate balance has become increasingly difficult in the 'digital age' and Australian law does not yet reflect the changing nature of society.

In October 2015, the Australian Government requested that the Productivity Commission undertake a 12-month public inquiry into Australia's intellectual property law. The Commission was asked to consider whether the current law provides an appropriate balance between access to ideas and encouraging innovation.⁵ Amongst other things, the Commission is required to have regard to incentives for investment, Australia's international trade obligations and recommendations of recently completed reviews. The Australian Law Reform Commission ('ALRC') published a detailed report in November 2013 recommending Australian law recognise 'fair use' of copyright material. In the United Kingdom, the Hargreaves Review was asked to review the benefits of a fair use exception in 2011 but concluded a US style 'fair use' exception was not suitable for European Union law.⁶ The Productivity Commission draws upon these two publications in the PC Report.

There are no registration system or formality requirements for copyright in Australia. Copyright protection is granted automatically from the time the original work is created. In order to attract copyright, a work must meet the following relevant criteria:

⁴ George Pike, 'An Update on Orphan Works' (2007) 24(7) *Information Today* 1.

⁵ Australian Productivity Commission, *Intellectual Property Arrangements Terms of Reference* (2015) <<http://www.pc.gov.au/inquiries/current/intellectual-property/terms-of-reference>>.

⁶ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) 101.

- (1) Expressed in 'material form';⁷
- (2) The material form is the recognised subject matter for protection;
- (3) The work is original in the sense that it has not been copied from another source;
and
- (4) There is a connecting factor between the work and Australia.

It is an infringement of copyright under the Act for 'any person other than the copyright owner to do any of the things a copyright owner is exclusively entitled to do in respect of the work or other subject matter',⁸ unless permission has been granted.⁹ Reproducing, publishing or performing a work may be an infringement of copyright. However, the rights of copyright owners are not entirely unrestricted – they are subject to considerations of what is 'fair and reasonable use'.

III FAIR DEALING PROVISIONS IN AUSTRALIA

Australian Copyright Law allows users to use copyrighted material without the owner's permission in certain 'fair dealing' situations.¹⁰ Determining whether a particular use of copyrighted material is a 'fair dealing' is assessed by a two-step process: firstly, does the copyrighted material fall within one of the categories provided in ss 40-43 of the Act? Secondly, was the use 'fair'?

Under the Act, it is permissible to reproduce works for the purposes of:

- (1) Research or study;¹¹
- (2) Criticism or review;¹²
- (3) Parody or satire;¹³
- (4) Reporting news;¹⁴ and
- (5) Seeking professional advice.¹⁵

In determining whether the use was 'fair', many factors are taken into account.¹⁶ For example, for the purposes of research and study, the court will

⁷ *Copyright Act 1968* (Cth) s 32.

⁸ Andrew Stewart et al, *Intellectual Property in Australia* (LexisNexis Butterworths, 5th ed, 2014) 207.

⁹ *Copyright Act 1968* (Cth) ss 36(1), 101(1).

¹⁰ Australian Copyright Council, *Fair Dealing: what can I use without permission?* (2014) <https://www.copyright.org.au/acc_prod/ACC/Information_Sheets/Fair_Dealing_What_Can_I_Use_Without_Permission.aspx>.

¹¹ *Copyright Act 1968* (Cth) ss 40, 103C, 112.

¹² *Ibid* ss 41, 103A, 112.

¹³ *Ibid* ss 41A, 103AA.

¹⁴ *Ibid* ss 42, 103B, 112.

¹⁵ *Ibid* ss 43, 104, 112.

consider¹⁷ the purpose and character of the use, the nature of the work, the amount and substantiality of the portion copied, the possibility of obtaining the work within a reasonable time at a price and the effect of the infringement on the commercial value of the work.¹⁸ However, the particular use must have first fallen into one of the categories listed in the Act.

IV FAIR USE PROVISIONS IN THE US

An 'open ended' model for a fair use defence is favoured under US Copyright Law.¹⁹ §107 of the *Copyright Act of 1976* (US) ('US Act') states that a 'fair use' of copyrighted work is not a copyright infringement. The section provides a list of non-exhaustive acts that may constitute 'fair use', including criticism, comment, news reporting, teaching, scholarship and research.²⁰

There are four factors set out in §107 of the US Act that guide the judge's discretion in deciding whether or not an act constitutes 'fair use', including:

- (1) The purpose and character of the use;²¹
- (2) The nature of the copyright work;²²
- (3) The amount and substantiality of the portion used;²³ and,
- (4) Market effect.²⁴

In contrast to the Australian approach, the fair use exception enables users to use copyrighted material that are in the public interest.²⁵

¹⁶ Australian Government Attorney-General's Department, *Short Guide to Copyright* (2012) <<https://www.ag.gov.au/RightsAndProtections/Documents/ShortGuidetoCopyright-October2012.pdf>>.

¹⁷ For the purpose of research and study and indirect sound recordings of performances in s 248A(1A) of the *Copyright Act 1968* (Cth) are the only exceptions which list matters to which regard is to be had in determining a fair dealing.

¹⁸ Australian Government Attorney-General's Department, above n 16.

¹⁹ Brian Fitzgerald, Cheryl Foong, Anne Fitzgerald, 'Copyright Exceptions – Beyond the *Copyright Act 1968* (Cth)' (2012) 11(2) *Canberra Law Review* 160, 166.

²⁰ Emily Hudson, 'Implementing Fair Use in Copyright Law: Lessons from Australia' (2013) 25 *Intellectual Property Journal* 201, 203.

²¹ *Copyright Act of 1976* (U.S.) §107(1).

²² *Ibid* §107(2).

²³ *Ibid* §107(3).

²⁴ *Ibid* §107(4).

²⁵ Jon Lawrence, 'Google Books wins 'fair use' but Australian copyright lags', *Electronic Frontiers Australia*, 19 November 2013 <<https://www.efa.org.au/2013/11/19/google-books-fair-use/>>.

V ANALYSIS OF APPROACH

The *Google Books* decision is a useful example of how the 'fair use' exception benefits innovation and technology. In 2004, Google started the 'Google Books Project' and began uploading published work in an effort to create an online database for the public to access.²⁶ The Project involved bi-lateral agreements between Google and a number of international research libraries.²⁷ The participating libraries submit books from their collection to Google and Google makes a digital scan of each book to upload on the Google search engine.

The Author's Guild brought an action against Google alleging the following acts constituted copyright infringement:

- (1) Acting without permission of rights holders to make digital copies available online;²⁸
- (2) Allowing users to search for specific words and see "snippets" of text; and,
- (3) Allowing participating libraries to download and retain the digital copies in violation of copyright laws.

Google defended on the ground that its actions constitute 'fair use' in accordance with 17 USC s 107 and were therefore 'not an infringement'.²⁹ The District Court agreed³⁰ and the Plaintiffs appealed to the Second Circuit Court. In relation to the 'fair use' exception, the Plaintiffs contended that:

- (1) The digital copying of entire books was not a "transformative use" and provides a substitute for Plaintiffs' words;
- (2) Commercial profit motivation precluded a finding of fair use;
- (3) Even if Google's copying of text do not infringe plaintiff's books, they infringe Plaintiffs' derivative rights in search functions;
- (4) The storage of books online exposes Plaintiffs to the risk of hackers; and,
- (5) The distribution of digital copies to participant libraries is not a transformative use and subjects Plaintiffs to the risk of loss of copyright revenues.

The Second Circuit Court rejected all of the appeal arguments and upheld the finding of the District Court that the 'fair use' defence was correctly applied. Leval J noted that:

²⁶ James North, Ravi de Fonseca and Kieran Donovan, 'Australia: Fair Use Doctrine: copyright defence: floodgates or fair go?', *Mondaq*, 19 February 2014 <<http://www.mondaq.com/australia/x/293868/Copyright/Fair+use+doctrine+copyright+defence+floodgates+or+fair+go>>.

²⁷ *Authors Guild v Google Inc.*, No 13-4829 (2d Cir. 2015) 5.

²⁸ *Ibid* 3.

²⁹ *Ibid* 3.

³⁰ *Authors Guild v Google Inc.*, 954 F. Supp. 2d 282, 294 (S.D.N.Y. 2013).

The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption ... the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.³¹

His Honour went on to describe the application of s 107 and the factors in ss (1)-(4), noting that it “does not furnish standards of recognition of fair use”.³² The Supreme Court in *Campbell* made clear that Congress had no intention ‘to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way’.³³ The statute ‘calls for a case-by-case analysis’.³⁴ Section 107’s four factors are not to be ‘treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright’.³⁵ The balance is between the original author’s exclusive rights over the works and the overall objectives of copyright law to expand public learning.³⁶ The Author’s Guild unsuccessfully appealed to the Supreme Court, which denied certiorari and allowed the Second Circuit Court’s decision to stand.³⁷

It is unlikely that the *Google Books* project would have fallen within any of the fair dealing exceptions under Australian copyright law. Whereas the libraries themselves may have utilised an exception under s 200AB of the Act,³⁸ Google would not have had similar recourse – it would not have met the first limb of the fair dealing exception. The digital copying of the books was not for the purposes of research or study, nor was it for criticism, parody, news or professional advice. The Australian Courts would have had to find that Google had infringed copyright and there was no legitimate exception on which it could rely. Google could not have legally digitalised books in Australia. The

³¹ *Authors Guild v Google Inc*, No 13-4829 (2d Cir. 2015) 13.

³² *Ibid* 13.

³³ *Campbell v Acuff-Rose Music Inc*, 510 US 569 (1994) 577 (quoting H.R. Rep. No. 94-1476, at 66 (1976), S. Rep. No. 94-473, at 62 (1975), U.S. 7 Code Cong. & Admin. News 5659, 5679 (1976)).

³⁴ *Ibid* 577.

³⁵ *Ibid* 578.

³⁶ *Authors Guild v Google Inc*, No 13-4829 (2d Cir. 2015) 15.

³⁷ David Kravets, ‘Fair Use Prevails as Supreme Court rejects Google Books Copyright Case’, *Ars Technica* (online), 18 April 2016 <<http://arstechnica.com/tech-policy/2016/04/fair-use-prevails-as-supreme-court-rejects-google-books-copyright-case/>>.

³⁸ *Copyright Act 1968* (Cth) s 200AB permits libraries, archives and educational institutions to use copyright materials in limited circumstances not covered by the specific exceptions outlined in the Act.

application of the *Google Books* case into Australian law demonstrates how fair dealing is not flexible enough to fit innovative technologies into old, rigid categories.³⁹ In contrast, the fair use approach allows for technological development and grants the public greater rights where necessary.

A *Advantages of the Fair Use Defence*

One key advantage of adopting a fair use exception is the level of flexibility the broader defence allows.⁴⁰ Flexibility in the intellectual property field of law is particularly significant, as the law must be able to adapt rapidly to developing technologies and circumstances.⁴¹ The current Australian legislative defence of 'fair dealing' only allows for 4 pre-determined categories of exemption from copyright liability and gives judges little room for discretion. For example, search engines such as Yahoo! and Google are unable to provide real time communication, analysis and search services with protection under Copyright law.⁴² Google submitted that 'innovation and culture are inherently dynamic... you cannot legislative detailed rules to regulate dynamic situations; you can only set forth guiding principles'.⁴³

A rigid legislative approach restricts innovation by automatically excluding all uses that fall outside of the four existing exceptions. By contrast, the fair use defence allows judges to take into account whether a particular use of copyrighted material could be perceived as 'innovative' or 'socially useful'.⁴⁴ In a submission to the ALRC, Google stated that it would not have been able to create its search engine in Australia due to the strict fair dealing exception as 'innovation depends on a legal regime that allows for new, unforeseen technologies'.⁴⁵ Consequently, Australian technology companies are

³⁹ Lawrence, above n 25.

⁴⁰ Australian Law Reform Commission, above n 3, 66.

⁴¹ Australian Government Productivity Commission, *Intellectual Property Arrangements – Productivity Commission Draft Report* (2016) 18.

⁴² Yahoo!, Submission No 276 to Australian Law Reform Commission, *Copyright and the Digital Economy*, December 2012.

⁴³ Google, Submission No 217 to Australian Law Reform Commission, *Copyright and the Digital Economy*, 30 November 2012.

⁴⁴ Australian Law Reform Commission, above n 3, 68.

⁴⁵ Above n 41.

disadvantaged in the international market, particularly when compared to US companies that have the benefit of a fair use exception.⁴⁶

Copyright law aims to balance the rights between ‘holders’ and ‘users’. The Australian approach to fair dealing swings the balance heavily in favour of copyright holders, providing them with unreasonably broad rights at the expense of users. In contrast, fair use enables people to use copyrighted works where it is in the public interest. For example, less stringent rules for copyright would further assist the educational sector. In a submission to the ALRC, Universities Australia proposed that there was a need for ‘an appropriate balance’ to ‘enable universities and their students to make full use of technology to create and disseminate knowledge’.⁴⁷ The current fair dealing provisions simply do not provide for that, and the ‘balance struck in the Australian *Copyright Act* does not adequately recognise the public interest in allowing limited free uses of copyright materials for educational purposes’.⁴⁸

Similarly, the adoption of a fair use exception would assist with meeting consumer expectations. The Hargreaves Review in the UK identified a significant problem in the ‘growing mismatch between what is allowed under copyright expectations, and the reasonable expectations and behaviour of most people’.⁴⁹ For example, consumers who post an item on eBay for sale may wish to upload a photo.⁵⁰ There may be an infringement of copyright where the item is a book or artistic work. The fair use exception would circumvent similar ‘technical infringements’ of copyright that do not result in loss or damage for the copyright owner.

B *Disadvantages of the Fair Use Doctrine*

Proponents against the introduction of a fair use doctrine, including Foxtel and News Corp Australia, argue that a new defence would increase court case

⁴⁶ Above n 42.

⁴⁷ Universities Australia, Submission No 246 to Australian Law Reform Commission, *Copyright and the Digital Economy*, November 2012.

⁴⁸ Copyright Advisory Group – Schools, Submission No 231 to Australian Law Reform Commission, *Copyright and the Digital Economy*, November 2012.

⁴⁹ Hargreaves, above n 6, [5.10].

⁵⁰ *Ibid* 70.

volume and costs as a result of uncertainty.⁵¹ Rights holders would be required to engage lawyers to better understand copyright scope and protection. The need to litigate to determine what constitutes 'fair use' in Australia may also increase costs.⁵² There were also concerns over the judiciary, not the legislature, determining the scope of copyright.⁵³ The BSA submitted that 'the Courts are not well equipped for legislating broad economic and policy issues of this type'⁵⁴ and NSW Young Lawyers were concerned that 'too much in the hands of the judiciary and judges would have an undesirable level of discretion in individual cases'.⁵⁵

In the Commission's view, legal uncertainty is not a compelling reason to reject fair use in Australia.⁵⁶ Courts are often called upon to interpret the application of legislation and that is the precise notion of the common law – that case law and precedent develop around statutory interpretation. The current Act is uncertain in many areas, including moral rights and parallel importation restrictions. The introduction of a fair use defence would further clarify the law in this area, particularly as the 'fairness factors' are already familiar in Australian law in regards to research and study.⁵⁷ The rapid increase in technology and innovation over the past decade simply *requires* a new approach. The flexibility to respond to individual cases is becoming increasingly important in this digital age and as such, Copyright law in Australia needs to adapt and respond in a similar way.

VI RECOMMENDATION

⁵¹ Annabel Hepworth, 'Tech Giants Call for Copyright Law Overhaul', *The Australian* (online), 18 January 2016 <<http://www.theaustralian.com.au/business/tech-giants-call-for-copyright-law-overhaul/news-story/7489b59bbob4ed1a1ca5b6076d626ae2>>.

⁵² Australian Law Reform Commission, above n 3, 75.

⁵³ BSA, Submission No 248 to Australian Law Reform Commission, *Copyright and the Digital Economy*, 30 November 2012; APRA/AMCOS, Submission No 247 to Australian Law Reform Commission, *Copyright and the Digital Economy*, 30 November 2012; Australian Publishers Association, Submission No 225 to Australian Law Reform Commission, *Copyright and the Digital Economy*, 30 November 2012; NSW Young Lawyers, Submission No 195 to Australian Law Reform Commission, *Copyright and the Digital Economy*, 5 November 2012.

⁵⁴ BSA, Submission No 248 to Australian Law Reform Commission, *Copyright and the Digital Economy*, 30 November 2012.

⁵⁵ NSW Young Lawyers, Submission No 195 to Australian Law Reform Commission, *Copyright and the Digital Economy*, 5 November 2012.

⁵⁶ Australian Government Productivity Commission, above n 41, 147.

⁵⁷ *Ibid* 148.

Adopting the reforms suggested by the ALRC in 2013, the Australian Productivity Commission recommends the replacement of Australia's current exception for *fair dealing* with the broader US-style *fair use* exception.⁵⁸ A broader fair use defence would facilitate flexible application of copyright law in individual cases – particularly those involving technology and innovation. The Commission recommends an open ended exception based on a number of 'fairness factors' which the courts would consider, including the:

- (1) Effect of the use on the market or value of the copyright protected work at the time of the use;
- (2) Amount, substantiality or proportion of the work used and the degree of transformation applied to the work;
- (3) Existing commercial availability of the work, and
- (4) Purpose and character of the use, including whether the use is commercial or private.⁵⁹

Currently, the Act only provides fairness factors for the purposes of 'research and study' under the Act. The Productivity Commission recommends the adoption of a US style fair use approach, including fairness factors for all categories of work. Fair use in the US has been recognised as a significant global innovator,⁶⁰ and Australia is lagging behind. Google Australia highlighted:

Innovation is dynamic, not static. In contrast, Australia's copyright exceptions are 'static' – confined to specific purposes and technologies, and not capable of adapting to changes in technologies, consumer uses or business practices. Australia's copyright system arguably prohibits critical technologies and innovative activities from being conducted in Australia...⁶¹

As the Hargreaves Review in the UK identified, the rapid increase in digital innovation and technology in recent years.⁶² The Commission recommends the Australian Government amend the Act to include a broad exception for fair use with a list of fairness factors similar to the US.

VII CONCLUSION

⁵⁸ Ibid 18.

⁵⁹ Australian Government Productivity Commission, above n 41, 18.

⁶⁰ Ibid 145.

⁶¹ Google Australia, Submission No 102 to Productivity Commission, *Intellectual Property Arrangements*.

⁶² Hargreaves, above n 6.

Following from the ALRC Report, the PC Report released by the Commission on 29 April 2016 recommends the introduction of a fair use style provision into Australian copyright law. The current fair dealing exception is narrow and restrictive in contrast to the flexible fair use approach adopted in the US. The author recommends the adoption of a fair use exception for copyright infringement, as recommended by the PC Report, to encourage innovation and technology in Australia.

Assume that fair use provisions operated in Australian law. The 35-year old author who produces work in 2016 and lives to 85 years will still have copyright protection until 2136. However, anyone who seeks to utilise his/her work will have greater opportunity to build upon that idea and spread recognition of that work. The Court will be afforded greater flexibility to take into the particular circumstances of the case. For example, if the infringement occurred in the year 2100, the Court may consider the nature of the copyrighted work⁶³, being toward the end of a very long period of protection, and allow for leniency. By utilising the factors: (1) the purpose and character of the use;⁶⁴ (2) the nature of the copyright work; (3) the amount and substantiality of the portion used;⁶⁵ and, (4) market effect,⁶⁶ the Court will be better equipped to flexibly apply copyright law in Australia.

To encourage innovation and technology in Australia, it is of fundamental importance that the current fair dealing exceptions be replaced with fair use provisions, as applied in the United States. The laws that govern our country and industry must continue to evolve just as the technology that drives it does.

⁶³ *Copyright Act of 1976* (US) §107(2).

⁶⁴ *Ibid* §107(1).

⁶⁵ *Ibid* §107(3).

⁶⁶ *Ibid* §107(4).

