

Fair Use for “Creative Innovation”: A Principle We Must Embrace

A Submission in Response to the A-G’s Issues Paper on Fair Use and Other Copyright Exceptions

Professor Brian Fitzgerald
Head of the Law School QUT

My basic point is that fair use as a tool for accessing and recreating culture fuels social, political and economic good in a process of creative innovation and should be adopted as a doctrine of Australian law.

1. The Context Demands It

Prime Minister John Howard and his government have a vision for an Australia built on sound economic principles giving opportunity for all to create and participate in the wealth of this country. They have also pursued international economic integration most notably with the USA and more recently with China.

If we are to believe US economist and information policy guru Richard Florida “creative innovation” is a critical factor in economic growth: R Florida, *The Rise of the Creative Class* (2002). Such innovation, Florida warns, will only be facilitated in a society that is tolerant of diversity and respects openness.

If we merge the economic and nation building agenda of the Howard government with Florida’s vision for a diverse, tolerant and open community sponsoring creative innovation the argument for a broad based US styled fair use right in our copyright law is compelling. Fair use becomes the platform upon which hard working and innovative Australians – the enterprise class – utilize in a seamless and uninterrupted way the informational and cultural resources that surround them (without fear of lawsuit) to build creative innovation or put more simply a vibrant Australian culture. This argument is even more compelling when you consider that the purpose of the recent AUSFTA was to provide the enterprise class with opportunity, yet it fails those very people by not putting Australians on the same footing as their American counterparts in terms of their ability to reutilize informational and cultural resources in the process of creative innovation.

2. Fair Use is Fundamental Principle in a Knowledge Based Society

While we briefly entertained a culture of constitutionally entrenched implied rights in the 1990s the current understanding of the Australian constitutional structure is one in which

basic rights and liberties are protected – as Dicey proposed – by the operation or “rule” of everyday law made by parliament and/or as interpreted by the judges.

That means that the operation of law is critically important to protecting our fundamental rights and liberties.

In a knowledge based society access to and reutilization of culture is central to basic existence. Access and reuse become fundamental – human, social and economic - rights in a knowledge based society: see World Summit on Information Society (WSIS) Declaration of Principles (2003), Principle B <www.itu.int/wsis/docs/geneva/official/dop.html>

Therefore debate over fair use is not simply about copyright law. It is about the way in which copyright law provides a structure for reconciling fundamental rights in a knowledge based society. That is a debate of fundamental policy and portrays the constitutional importance of legislation and the common law in protecting basic rights and liberties.

In providing for a doctrine of fair use the Australian *Copyright Act 1968* would establish a charter for access and user that would fuel and recognize creative innovation as an integral part of human existence in Australia’s knowledge based society.

3. Fair Use as Fundamental Principle Fits with Australian Law

The hallmarks of a healthy democratic society include respect for a market economy, the rule of law and basic democratic freedoms such as free speech.

Australian law upholds these aspirations through a variety of mechanisms but most obviously we underpin a dynamic market through competition/antitrust law, the rule of law through an independent judiciary and formal equality before the law and basic democratic freedoms through implied rights e.g. to free political communication and the general principles of private and public law.

Fair use is consistent with and augments these aspirations. It provides a platform for allowing access to and reuse of copyright material (in certain conditions) without the copyright owner’s permission. This is very much the stuff of free speech in a democratic society more so than narrowly focused fair dealing exceptions that are philosophically cool towards engines of free expression such as parody, remix or format shifting.

Fair use also draws inspiration and displays consistency with other broad principles in our law such as competition law which is designed to ensure that commercial actors do not abuse their power in the market place. One very effective way to ensure that this does not happen in a knowledge based society is to allow consumers some right to access, reproduce and communicate information, knowledge or culture without the permission of

the copyright owner. It ensures to some extent that no one entity can use the law to stifle competition in the area of creative innovation. In this way the enterprise class exerts a certain amount of grass roots or direct regulation over corporate abuse of power.

4. Specific Issues that Need to be Considered in Adopting Fair Use

The following are some issues that need to be considered in legislating fair use as legal doctrine in Australian law:

a) How would it apply to the anti-circumvention provisions?

If fair use is not adequately protected in this area then its impact will be significantly reduced through the use of technological protection measures. This is a difficult issue but a fair balance needs to be achieved.

b) To what extent should contract be allowed to override any doctrine of fair use?

The extent to which any doctrine of fair use can be overridden by contract is critical to its effective operation and must be closely considered in light of the CLRC's *Copyright and Contract Report* (2002). Once again a fair balance needs to be established.

c) How do you reconcile a fair use provision with moral rights?

This is done to some degree through the notion of "reasonableness" in moral rights doctrine but a dynamic fair use doctrine for the digital age *may* require some revision of the current moral rights regime.

5. Crown Copyright and Publicly Funded Copyright Material

There is a presumption in a democratic society that Crown copyright or more broadly publicly funded copyright material should be available for non commercial purposes to every citizen. The extent to which taxpayers dollars have gone into the production process, the type of information involved and the need for commercial return in the business of government are factors which need to be assessed in establishing or denying open access (meaning the right to copy, communicate and in some instances modify) for non commercial purposes. Copyright material funded by public money possesses what I call a "democratic heritage" that requires the distribution and exploitation of that material to be exercised in the best interests of the people

The classic example here is legislation and judgments – funded by the taxpayer and of critical importance to the functioning of our democracy. They should be available for open access for every citizen to take and utilize in a non commercial manner: see s 182A *Copyright Act 1968*; CLRC *Crown Copyright* (2005) Chapter 7.

A closer analysis of the categories – or what Terry Cutler describes to me as a taxonomy – of publicly funded copyright material needs to be undertaken. And we need to match and mould the democratic heritage of this copyright material with the reason we have generated such material. In short there will be some categories of publicly funded material that will be ripe for open access for non commercial purposes and other categories that will not: see further B Fitzgerald, “Submission to CLRC on Crown Copyright” (2004) <www.clrc.gov.au>

This issue might be seen to be more in the domain of the CLRC’s Reference on Crown Copyright. However the interrelationship between this review on Fair Use and the CLRC’s Review on Crown Copyright needs to be understood and articulated. Amidst a world wide movement towards open access to publicly funded copyright material for non commercial purposes we need to understand how the vast landscape of publicly funded copyright material which exists in Australia can be utilized. In the longer term we will be forced to provide guidance on what sorts of publicly funded material should be made available for open access and the uses that can be made of it. The opportunity exists as part of this Fair Use Review to lead the world in providing guidance on “fair use” or open access to publicly funded material.

Conclusion

Our current law puts us a disadvantage compared with our free trade partner the United States. If we truly believe that Australia can and needs to be a leader in terms of creative innovation we should embrace the doctrine of fair use in Australian law. This will facilitate the tolerance, diversity, competition and modernisation that we need to fully engage with 21st century knowledge society.

PROFESSOR BRIAN FITZGERALD

BA (Griff) LLB (Hons) (QUT) BCL (Oxon.) LLM (Harv.) PhD (Griff)

Head of Law School, QUT Brisbane Australia

bf.fitzgerald@qut.edu.au

Website at: <http://www.law.qut.edu.au/about/staff/lstaff/fitzgerald.jsp>

Brian is a well-known intellectual property and information technology lawyer. He is co-editor of one of Australia's leading texts on E Commerce, Software and the Internet - *Going Digital 2000* - and has published articles on Law and the Internet in Australia, the United States, Europe, Nepal, India, Canada and Japan. His latest (co-authored) books are *Cyberlaw: Cases and Materials on the Internet, Digital Intellectual Property and E Commerce* (2002); *Jurisdiction and the Internet* (2004); *Intellectual Property in Principle* (2004). Over the past four years Brian has delivered seminars on information technology and intellectual property law in Australia, Canada, New Zealand, USA, Nepal, India, Japan, Malaysia, Singapore, Norway and the Netherlands. In October 1999 Brian delivered the Seventh Annual Tenzer Lecture - Software as Discourse: The Power of Intellectual Property in Digital Architecture - at Cardozo Law School in New York. In

October 2000 he was invited as a part of the Distinguished Speaker series hosted by the Ontario wide Centre for Innovation Law and Policy to deliver an address on “Digital Property” at the University of Western Ontario Law School in London, Canada. Through the first half of 2001 Brian was a Visiting Professor at Santa Clara University Law School in Silicon Valley in the USA. In January 2003 Brian delivered lectures in India and Nepal and in February 2003 was invited as part of a distinguished panel of three to debate the Theoretical Underpinning of Intellectual Property Law at University of Western Ontario in London, Canada. During 2004 Brian has presented talks in Germany, India and China and was a Visiting Professor in the Oxford University Internet Institute’s Summer Doctoral Program in Beijing in July 2004. He is also a Chief Investigator in the newly awarded ARC Centre of Excellence on Creative Industries and Innovation. His current projects include work on digital copyright issues across the areas of Open Content Licensing and the Creative Commons, Free and Open Source Software, Fan Based Production of Computer Games, Licensing of Digital Entertainment and Anti-Circumvention Law. Brian is a Project Leader for Creative Commons in Australia. From 1998-2002 Brian was Head of the School of Law and Justice at Southern Cross University in New South Wales, Australia and in January 2002 was appointed as Head of the School of Law at QUT in Brisbane, Australia.

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