

## BOOK REVIEW

**Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005)**

It is a daunting and exhilarating thing to encounter a book on the same topic as your own doctoral thesis, so it was with both excitement and trepidation that I first opened this book. I knew at the outset that I shared the authors' belief that this is a timely and important work in the context of current copyright reform. I also endorse the authors' conclusions regarding the importance of fair dealing in protecting the values embodied in freedom of communication.

The nature and function of copyright exceptions has become a topic of particular interest in recent years, largely due to the fact that digital technology means that individuals can now become direct infringers of copyright material. Burrell and Coleman's book is therefore timely, although the debate is raging so fast that it is difficult to keep up with developments.

The impetus for this book apparently came from the proposed (as it then was) harmonisation of copyright law under the European Union's Information Society Directive. Readers should note that this book focuses upon United Kingdom copyright law, which is markedly different from the Australian law in this area, despite the fact that Australian law was derived wholesale from English law (as was the United States law which has subsequently developed into the much discussed law of fair use). In Australia the controversy over exceptions has been generated by Australia's entry into the *Australia-United States Free Trade Agreement* and perhaps, to a lesser extent, by the Copyright Law Review Committee's report, *Copyright and Contract*.<sup>1</sup> The scope and nature of exceptions to the rights of copyright owners is not prescribed by the *Berne Convention* beyond the three-step test, however, the adoption of this test in the *TRIPS Agreement* has raised further questions regarding whether the US in fact complies with this test.

Burrell and Coleman describe themselves as 'pro-user' and argue for extension of the copyright exceptions. In order to do this they undertake an extensive review of the current law in this area and conclude that the current law is difficult to apply and too inflexible, creating real problems for those seeking to interpret and apply that law. They argue for reform of the existing UK copyright law to introduce a new set of exceptions (or alternatively, and more controversially, 'users' rights') crafted around the provisions prescribed by the Information Society Directive, and for the re-introduction of a limited public interest defence. They also hope to bring a perspective to the debate over copyright reform which acknowledges the importance of the user and to change judicial and legislative

<sup>1</sup> Copyright Law Review Committee, Australian Government Attorney-General's Department, *Copyright and Contract* (2002).

attitudes to copyright, so that users' interests are no longer marginalised, or worse, completely ignored.

The authors seek to take a pragmatic approach noting that too often 'copyright theorists write as if they were designing a copyright law in a state of nature, rather than against the backdrop of an existing body of law that has created a series of expectations around which a variety of actors have structured agreements, understandings and practices'.<sup>2</sup>

The book is broken into 10 chapters, with Ms Coleman taking principal responsibility for chapters four and five, which deal with the nature of current exceptions applying to education, research and private study, and the provisions directed to copying and use of copyright material by libraries and archives. Mr Burrell took sole responsibility for the remainder of the work.

Part one provides an overview of the existing law. Chapter one examines the relationship between copyright and freedom of expression. This topic is one that has been the focus of a great deal of academic writing in the US, given the importance of the First Amendment in the US and the centrality of this issue to consideration of the constitutionality of the copyright term extension in *Eldred v Ashcroft*.<sup>3</sup> Burrell argues that UK law fails to take account of the importance of freedom of expression and the same criticism could certainly be extended to the Australian context. As Burrell correctly states, judges and others have downplayed the conflict between copyright law and the concept of freedom of expression, tritely concluding that these values are protected by the idea-expression dichotomy: 'we argue that the United Kingdom's present approach to the exceptions needs to be liberalised so as to ensure that copyright can no longer impede the dissemination of political information — "political" information being understood in a broad sense'.<sup>4</sup> Rather than reject the relevance of these issues, Burrell concludes that the issues should be given explicit consideration in cases relating to information relevant to the political process. This conclusion accords with the development in Australian law of a narrow right of freedom of political communication.

Chapter two canvasses the current UK law on exceptions for the purposes of criticism, review and news reporting. In particular, the text highlights those aspects of the defence which limit the defendant's ability to rely upon that defence, such as the exclusions relating to photographs and unpublished works.<sup>5</sup>

In relation to the thorny issue of contracting out of the exceptions, the authors acknowledge but downplay the potential problems. They argue that there is no clear evidence currently available that such contracting out is widespread. The authors flag the fact that such issues are likely to be influenced by consumer

<sup>2</sup> Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (2005) 8.

<sup>3</sup> 537 US 186 (2003).

<sup>4</sup> Burrell and Coleman, above n 2, 38.

<sup>5</sup> These limitations are not found within Australian copyright law.

demand. It is acknowledged that this is not a key focus of the book, but it does somewhat sidestep a very important issue — will it be necessary to introduce consumer protection measures?<sup>6</sup> The authors conclude that a blanket prohibition on contracting out of the exceptions is not desirable as it is too inflexible. Similarly, they downplay the potential problems that may be created by technological protection measures, stating that it is too early to know how effective or restrictive such measures may be. The authors are optimistic that a mutually beneficial solution may be found to the potential ‘arms race’ which may be generated by these technologies; for example, that copyright owners may respond to market pressure to build in an allowance for a limited amount of free use in their chosen copyright protection method. Any further consideration of these issues is stated to be outside the scope of the book.

Chapter three reviews the current statutory measures relating to criticism, review and news reporting, concluding that they are inadequate to protect the values embodied in freedom of expression. It also reviews the rise and fall of the judicially created public interest defence. Burrell makes a compelling argument for the reinstatement of the defence, drawing on the public interest defence to breach of confidence, to supplement a reinvigorated set of user exceptions. It is in this section dealing with the nature and scope of a public interest defence that Burrell is at his most interesting and persuasive. This is material he has clearly pondered at length.

Chapters four and five review the limited nature of the exceptions directed at education, research and private study, and libraries and archives. In particular, the chapters highlight the narrow drafting of these provisions which limit the range of persons who may rely upon them. Further, the provisions do not reflect the changing nature of galleries, museums, libraries and archives as they respond to user demands to become more interactive. The EU Information Society Directive has provided the opportunity for a radical revision of these provisions.

In the context of exploring why the UK has adopted such a restricted approach to the copyright exceptions, chapter six examines and challenges three key beliefs about copyright which have shaped and influenced the nature and role of exceptions to copyright. These three beliefs are: the market failure theory of copyright; the ‘copyright is property’ argument; and the notion of copyright as balance. This chapter constitutes a very interesting and very useful survey of current thinking in this area, neatly synthesising a wide variety of academic debate on these points. Looking specifically at the topic of the economic analysis of copyright, and the argument that fair dealing and certain other users’ exceptions may be explained as a response to market failure, Burrell neatly articulates both sides of the argument. This analysis is useful, because as Burrell

<sup>6</sup> See, eg, the submission by the National Consumer Council (UK) to the current UK Inquiry into Digital Rights Management: National Consumer Council, *National Consumer Council submission to The All Party Internet Group inquiry into Digital Rights Management* (2006) <<http://www.ncc.org.uk/intellectualproperty/digitalrightssubmission-final.pdf>> at 4 July 2006.

notes, most of the writing in this area seems to emanate from polarised extremes. The other key focus of this chapter is criticism of the looseness of the term ‘balance’ when it comes to providing a justification for a particular outcome in shaping the nature of copyright. Burrell notes that the key flaw with using the concept as a tool in shaping copyright is that it is used both in terms of being ‘an apparatus for weighing’ and ‘a harmony of proportion and design’<sup>7</sup>:

The importance of the linguistic shift that can take place between the two meanings of ‘balance’ is perhaps best illustrated by considering the claim that copyright laws have always been formulated by a process of balancing, a claim which is usually followed by a call for this balance to be maintained. A moment’s reflection shows that there is a non sequitur here. The first claim, that copyright laws have in the past been formulated by a *process* of balancing, simply tells us that in the past other interests have been set off against copyright, a claim which can be justified by reference to a host of legislative materials and judicial decisions. The second claim, that this balance should be maintained, assumes that in the past this process has achieved the ‘correct result, a claim which needs to be supported by detailed argument. That this error in logic is not immediately obvious has much to do with the different meanings of the word ‘balance’.<sup>8</sup>

Whilst Burrell is correctly critical of this imprecise application of the notion of balance, it should be kept in mind that it has at least acted to some small extent as a brake on the rampant expansion of owners’ interests. It is a concept which even the Australian Government has acknowledged whilst granting ever broadening rights to copyright owners.<sup>9</sup> It must therefore be recognised that the concept should be refined and clarified rather than abandoned. Further, Burrell later concludes in chapter eight that these three key concepts have also influenced the judiciary to adopt a narrow approach to the interpretation of exceptions.

Chapter seven deals with the international context in which any reform of the copyright laws must be undertaken. Burrell builds upon the earlier work of Professors Ginsburg and Davies who have argued that the differences between authors’ rights and copyright have been overstated.<sup>10</sup> Burrell points out that the push to ‘harmonise’ EU law therefore became preoccupied with the need to reconcile (or ‘balance’) the different copyright traditions rather than the rights of copyright owners and users. Further, the concepts which have restricted the recognition of users’ rights outlined in chapter six have influenced the law in both the domestic (UK) and international arenas.

<sup>7</sup> Leslie Brown (ed), *The New Shorter Oxford English Dictionary* (1993), as quoted in Burrell and Coleman, above n 2, 188.

<sup>8</sup> Burrell and Coleman, above n 2, 188-9.

<sup>9</sup> See, eg, Attorney-General’s Department, *Fair Use and Other Copyright Exceptions, Issues Paper* (2005) 2.

<sup>10</sup> Jane C Ginsburg, ‘A Tale of Two Copyrights: Literary Property in Revolutionary France and America’ (1990) 64 *Tulane Law Review* 991; Gillian Davies, *Copyright and the Public Interest* (2<sup>nd</sup> ed, 2002).

In chapter nine, Burrell considers the very topical issue of whether the problems outlined above could be solved by the adoption of a fair use style defence.<sup>11</sup> Australia is one of several countries which has recently considered whether it would be desirable to adopt a fair use style defence in place of (or perhaps in addition to) fair dealing. Burrell notes that both supporters and opponents of this point of view assume that judges would apply a fair use test in a manner which would strengthen the rights of users. Burrell, on the other hand, argues that judges already have or had the necessary tools to protect users at their disposal and chose not to use them. Therefore, 'unless the introduction of a fair use exception were accompanied by a transformation in judicial attitudes (and to a lesser extent in the attitudes of commentators) it would be unlikely to do much to improve the current position'.<sup>12</sup> As Burrell correctly demonstrates, although judges are hailed as the protectors of users' rights due to the creation of the concepts of fair dealing and fair use, which were not codified until the twentieth century, they have read these defences quite narrowly. Such defences would not even have been necessary had the legislative grant of copyright been interpreted more narrowly. He argues correctly and convincingly that the proponents of such change have failed to consider how the US style defence may be interpreted and applied in the very different legal context of the UK (or for that matter Australia). I certainly agree with his scepticism on this point. Burrell concludes that it would be preferable to adopt a list of flexible, but open ended, defences as permitted by the EU Information Society Directive.

In chapter 10, the case is made for the need to change judicial and public attitudes towards the rights of copyright users, as well as the need to change the law. This conclusion should be read in light of the fact that Burrell and Coleman acknowledge the limitations of the system within which they are working. They are arguing for a reconsideration of the existing system of exceptions, arguing that such change is possible and practical. They do not argue for a completely different system of users' rights, however desirable such a system may be, as it would not be a practical outcome.

As noted above, the book does not delve into the question of contracting out of such exceptions, nor the potential impact of technological protection measures in any detail. However, the book is a welcome addition to the very topical debate over the scope of copyright protection and how far users should be labelled as pirates and infringers. The focus upon the tension between copyright and freedom of expression is also very welcome, as in Australia, with no human rights Act, freedom of political communication offers a very small avenue for

<sup>11</sup> The Attorney-General's Department released an issues paper in 2005 seeking comment on whether Australia should adopt a fair use style defence (see above n 9). It has recently been announced that Australian law will be amended to legalise the private copying of television programs for later viewing and the copying of compact discs for playing on an MP3 player, such as an iPod. See The Honourable Philip Ruddock, 'Government's Copyright Policy Agenda' (Paper presented at the 12<sup>th</sup> Biennial Copyright Law and Practice Symposium, Sydney, 17 November 2005).

<sup>12</sup> Burrell and Coleman, above n 2, 253.

protection of such interests. This is only the beginning of the consideration of these issues and a lot more work needs to be done in this area.

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