

SHOULD AUSTRALIA MOVE TO FAIR USE?



Lawyer and Professor of Law at Penn State University Geoff Scott recently took part in a panel at Monash University discussing Australia changing its copyright law from the current 'fair dealing' legislation to 'fair use' legislation. Sharon Stewart was in the audience.

I found this panel interesting, not just because I'm a copyright nerd, but because most people seem to support Australia moving to fair use. Although I could see why not being restricted to formats when copying material seems to be a really good reason to support this move, I could also see problems.

In the United States, copying from one format to another is allowed as long as the 'four fairness factors' are adhered to. These are: the purpose and character of use, the nature of the copyrighted work, amount and substantiality, and the effect of the use upon the potential market or value.

The four fairness factors, just like the fair dealing exceptions, are all open for interpretation. To limit interpretation it is suggested that we rely on the vast body of United States legal material. However, Geoff Scott pointed out the following problem, a problem that is keeping United States lawyers busy, and a problem that I have read about all over the internet.

That problem is how the term 'transformative' is being interpreted.

Campbell v Acuff-Rose is the first case where the term, 'transformative' came to be such a big player within copyright law. Souter, the judge in the case, asked courts to take into consideration the term 'transformation' with regard to how the adapted work builds on the original work. By doing this he meant considering whether the new work adds something new or adds a new meaning, expression or purpose. But Souter also asked that the term 'transformative' also be used alongside the other four fairness factors.

'Alongside the other four fairness factors,' seems to have been lost in subsequent interpretations.

There are various examples of the way in which 'transformative' is overriding the four fairness factors. In *Green Day v Seltzer*, the band Green Day used a modified version of an artist's (Seltzer's) work as a back drop for their stage show. A red cross was placed over the image and the colour was altered. It was decided that it was transformative, so it did fall under fair use according to the judgement, however the judge obviously didn't think it was sufficiently clear as Green Day were asked to pay Seltzer's legal fees. In another example, the photography artist Cariou lived for many years with Rastafarians and took many intimate photos of them. He made a small amount out of the photos. The well-known artist Prince modified the photos slightly and sold them on for considerable amounts. The *Cariou v Prince* case was in and out of the courts, with the final ruling stating that Prince's work was deemed transformative enough.

So I came out of this talk asking what should Australians do in terms of copyright law? Fair dealing isn't working for us and fair use isn't working in the United States. Really? Is there an answer? The world of our childhood is different from the world we live in now. How can we have all of the answers? But I do know that copyright law needs to change faster than it has in the past or Australia will be left behind.

Maybe the European Publishers Council has some of the answers with their metadata that attaches copyright holders to all digital material. Maybe *The Hargreaves Report* in the United Kingdom has some of the answers.

I know there is no silver bullet answer. This is something we will all have to keep working on so that we can safe-keep the rights of rights holders as well as respect the rights of information seekers. Information is a commodity that needs to be shared, valued and respected.

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