

Report - CAMLA Seminar

“Fair Use, Flexibility, Innovation and Creativity”

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On 22 February 2017, CAMLA presented its second seminar for 2017, “Fair Use, Flexibility, Innovation and Creativity”, hosted by Clayton Utz. The seminar was well-attended by those interested in hearing from the esteemed panellists, Professor Patricia Aufderheide, Professor Sean Flynn, Professor Michael Geist, Professor Peter Jaszi, and author and lawyer Bill Patry, on the Productivity Commission’s report on Intellectual Property Arrangements in Australia. The seminar was moderated by Tim Webb, Partner at Clayton Utz.

The Productivity Commission’s report, released on 20 December 2016, again brought fair use and flexibility into the spotlight in the Australian copyright debate. The Commission’s view is that fair use is important for productivity and innovation, whilst others believe that fair use only spells uncertainty for content creators. The panel generated an informed and well-considered discussion about how fair use and fair dealing work in practise in the United States and Canada, what Australia should consider moving forward, and why there is a global trend towards more flexibility in copyright.

Tim Webb commenced the evening’s discussion with a comprehensive rundown of the fair use debate in Australia. The scene was set with a caveat that whilst the panellists were all largely in favour of fair use, the Commission’s report had been received negatively by certain groups. Some sectors had deemed the Commission’s recommendation for fair use to be “a creator’s nightmare and a lawyer’s paradise” and an “ideological attack on content”.

With this topical divide in mind, the panel discussion commenced

with Professor Jaszi providing the background to fair use in the US, beginning with the first fair use case dating back to 1841.¹ As case law continued to develop in the US the *Copyright Act* was introduced in 1976. The Act grants five exclusive rights to copyright holders², all of which are subject to certain exceptions, including s107 which is the general exception of fair use. The section includes four key factors to be considered to determine if a use is “fair”, these being purpose, nature, amount, and market effect of the use. Professor Jaszi noted that after a decade of initial conservative judicial interpretation, the US courts have gradually become more open and flexible in their interpretation of fair use.

The baton was then handed to Professor Geist to provide an account of the position in Canada. Professor Geist outlined the principle idea that in order to qualify under the fair dealing exceptions found in the *Copyright Act of Canada*, the dealing must be for a listed purpose (being research, private study, criticism or review, or news reporting) and must be fair. Professor Geist explained that the long running Supreme Court case of *Cinar Corporation v. Robinson*³ was instrumental in the development of fair dealing in Canada, and addressed important issues including the appropriate test for copyright infringement, the role of expert evidence and the assessment of damages. This case also emphasised the need for a balance between user rights and creator rights. In 2012, the Canadian *Copyright Modernization Act* amended the *Copyright Act of Canada* to include the additional listed purposes of education, parody and satire.

With the jurisdictional boundaries between the US and Canada set, the discussion moved on to the topic of innovation with one panellist remarking that copyright legislation becomes problematic when it is not future-proofed for technological developments. A member of the panel observed that Australian legislation is not as flexible as it is in the US, especially with respect to innovative technology and this could result in business owners in Australia shifting their dealings overseas to get the value of more flexible copyright legislation.

The conversation segued to the major theme of the evening: would fair use in Australia be a disincentive to Australia’s innovators and the creative community? The panel shed light on this proposition by providing practical examples from their own jurisdictions. An interesting discussion commenced regarding the concerns raised by US documentary film makers in 2005, who were increasingly constrained by insurers who demanded clearances for all copyright material included in the films before they would provide insurance. The *Documentary Filmmakers’ Statement of Best Practices in Fair Use* was introduced, and resulted in filmmakers being able to lower their clearance costs whilst also dealing ethically with copyright protected material. One panel member commented that the document was instrumental in demonstrating that there was no clear evidence to suggest that copyright owners were losing out as a result of the type of fair use, and that documentary filmmakers are creators too.

The discussion moved on to the 2016 PWC report⁴ commissioned by Screenrights, APRA AMCOS, PPCA, Copyright Agency, Viscopy, Foxtel

1 *Folsom v. Marsh* 9. F.Cas. 342 (C.C.D. Mass. 1841).

2 Section 106 Copyright Act 1976.

3 *Cinar Corporation v. Robinson* 2013 SCC 73.

and News Corp Australia, for the purpose of conducting a cost-benefit analysis of fair use. The predominant findings of the report were firstly, that fair use would create a disincentive for content creators and secondly, that it would not assist Australia's economy. One panellist strongly warned against the results of the PWC report, which they viewed as having been "debunked". The experience in Canada was then considered and a member of the panel noted that Canadians are increasingly paying for content and this is a real generational shift from when people would simply download material. It was considered that this was because the rights of content owners had been given more attention in the last decade.

The floor was later opened to questions and comments from the audience. Once audience member raised concerns about the fear of "wholesale copying" if Australia was to adopt a fair use exception. A panel member countered this concern by explaining that there have now been a number of cases in the US regarding fair use and that no "explosions" of wholesale copying had occurred. Rather, it has led to a steady, progressive development of fair use, which has been supported by US Supreme Court decisions in which not all fair use has been found to be fair.

When asked about the advantages of fair use over fair dealing, a consensus could not be reached. However, one panel member considered that Canada has developed from having very rigid fair dealing arrangement, to a much more flexible system, and this was a positive step. In general, the panellist noted that respect for copyright in Canada has gone up and infringement has gone down, and this gradual shift has had a major impact on universities, as students are thinking about copyright and licences—and not simply downloading material as had been a trend in the past. Switching to the US, a real advantage of fair use was considered to be the way that the legislation has been



drafted to be technology-neutral, and thus adaptable to technological change. The panel pressed that because Australia has a tendency to "make changes more gradually", if it does pursue fair use, it would be important for the legislation to be future-proofed to accommodate technological changes.

As the discussion was coming to a close, Professor Aufderheide suggested that the question that should guide considerations in Australia on the question of the introduction of fair use is: what is being lost to Australian culture under the current law? An example was provided with respect to education

and the inability for teachers to use social media to design programs that cater to what is in essence a vast source of information.

The seminar provided some excellent insights into how Australia might navigate its way to a doctrine of fair use. One panel member noted that it was important to remember that "fair use is not free use", "not all use is fair use", and consequently a person cannot be totally for or against fair use in every case. With this in mind, it will be interesting to observe further developments in this space, and whether fair use will become an available tool for Australian users and creators.



4 "Understanding the Costs and Benefits of introducing a 'fair use' Exception", PWC, published February 2016.