

DOES ‘LITERAL BOHEMIAN RHAPSODY’ INFRINGE COPYRIGHT?

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‘Is this the real life? Is this just fantasy?’ The opening lyrics of British rock band Queen’s hit song Bohemian Rhapsody are undoubtedly recognisable. The song was released in 1975 to incredible commercial success, inspiring many to create their own renditions and parodies. One creation in particular, ‘Literal Bohemian Rhapsody’, uses Bohemian Rhapsody song lyrics and turns it into a dramatic re-enactment. The legal question then becomes, does this infringe copyright?

Queen has copyright protection over the song. Given that the song is so well known, it is conceivable that use of any of the lyrics, even if it were just two lines, would constitute a substantial portion of the song, thereby infringing copyright. However, the creators of the video could rely on the Australian fair dealing defence or the American fair use defence. The differences between the two defences are considered and ultimately this essay concludes that both could be successfully raised and the video would not infringe copyright.

I INTRODUCTION

In the world of creative expression, perhaps the most pertinent form of intellectual property protection is copyright. Copyright protection confers upon authors and owners of work the freedom to publish and exploit their creative endeavours. Copyright is crucial for musicians, as music is so accessible to the public that it is relatively easy to copy work. This concern manifests itself in the tendency of aspiring musicians and creators to publish videos on sites like YouTube in the hope of gaining views, and possibly even going viral. One creation is ‘Literal Bohemian Rhapsody’, a dramatic re-enactment of the 1975 hit song ‘Bohemian Rhapsody’ by British band Queen. The video, published in 2016, gained attention online and quickly became a hit. The legal question then becomes whether this infringes the copyright in the song. This essay will attempt to answer that question firstly with reference to Australian copyright rules, considering the subsistence of copyright in the song, moral rights, infringement and the fair dealing defence. It will also consider fair use, compare and analyse the differences between fair dealing and fair use and consider whether Australia should adopt the fair use defence.

II BACKGROUND

Freddie Mercury, Brian May, Roger Taylor and John Deacon formed Queen in the 1970s. They released their self-titled debut album in 1973 and their LP ‘A Night at the

Opera' two years later,¹ featuring 'Bohemian Rhapsody' written by front man Freddie Mercury.² The song was produced by Roy Thomas Baker, with the original sound recording made by Queen Productions Ltd. Rights were later exclusively licensed to EMI Records Ltd.

The video 'Literal Bohemian Rhapsody' was uploaded to YouTube on the 5th December 2016 to the Corridor Digital YouTube Channel.³ It was a collaboration between Corridor Digital's main creative thinkers Sam and Niko, and Video Blocks. The video itself is a dramatic re-enactment of the song, only using the lyrics from 'Bohemian Rhapsody' as dialogue to comedic effect. To date, it has over 3.5 million views on YouTube.⁴

III SUBSISTENCE OF COPYRIGHT

Underpinning copyright is the idea/expression dichotomy. This means that copyright protects the expression of ideas, not ideas themselves.⁵ Australian copyright law affords protection to works and subject matter other than works. The difference between the two presents itself in the threshold criteria an author needs to establish in order to get protection. For works, they need to be original,⁶ expressed in material form,⁷ be authored and have some connecting factor to Australia. 'Works' are defined under the Australian Copyright Act as literary, dramatic or musical or artistic works.⁸ One piece of creative expression can contain different works for the purposes of the Act. In this case, the song 'Bohemian Rhapsody' contains three works. Firstly, the lyrics are a literary work.⁹ Secondly, the music is a musical work.¹⁰ The final product is a sound recording, a subject matter other than work.¹¹

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¹ Rolling Stone, *Queen Bio*, <<https://www.rollingstone.com/music/artists/queen/biography>>.

² BBC America Anglophenia, *10 Things You May Not Know About Queen's 'Bohemian Rhapsody'*, <<http://www.bbcamerica.com/anglophenia/2015/10/10-things-you-may-not-know-about-queens-bohemian-rhapsody>>.

³ YouTube, *Literal Bohemian Rhapsody*, <<https://www.youtube.com/watch?v=PJO7bcRVPvI&t=245s>>.

⁴ Ibid.

⁵ World Trade Organization, *Part II – Standards concerning the availability, scope and use of Intellectual Property Rights*, <https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm>.

⁶ *Copyright Act 1968 (Cth)* s 32(1)

⁷ Ibid.

⁸ *Copyright Act 1968 (Cth)* s 10(1).

⁹ Ibid.

¹⁰ Above n 6, 2.

¹¹ Above n 7.

For the purposes of analysing whether the video infringes the song, the most relevant work is the literary work as this is what is appropriated in the video. This is original as it was not copied and Freddie Mercury's creative writing process demonstrates the requisite independent intellectual effort directed to the particular form of expression required under Australian copyright law.¹² *Bohemian Rhapsody* is in material form,¹³ given the lyrics were written down and appear in the sound recording. The lyrics are clearly authored by Freddie Mercury,¹⁴ and there is a connecting factor to Australia as *Bohemian Rhapsody* was sold and performed in Australia. Hence, it is clear that copyright subsists in the lyrics of *Bohemian Rhapsody* as a literary work for the purposes of the Australian Copyright Act.

Another issue here is ownership of copyright. The general rule is that the author is the owner of copyright; following this rule, Freddie Mercury would be the owner of copyright in the song lyrics.¹⁵ However, it is possible that he assigned his rights over to his record label at the time he wrote the song, meaning that the record label EMI could be the owner of copyright in *Bohemian Rhapsody*. Assuming that Freddie Mercury himself is the only owner of copyright in the lyrics, he is conferred with special rights and privileges including the right to reproduce it, make it public for the first time, communicate the work to the public, perform the work in public and make an adaptation of it.¹⁶ He can also assign this copyright, meaning the assignee would be able to do acts the owner of copyright would otherwise have the exclusive right to do.¹⁷ These rights last for "70 years after the end of the calendar year in which the author of the work died."¹⁸ Freddie Mercury died on 24 November 1991,¹⁹ so his copyright protection spans from that point onwards for 70 years. The video, released in 2016, is evidently within this copyright protection period.

It will now be necessary to address who will be able to exercise the rights in the literary work. Without more information about whether Freddie Mercury assigned these rights away in his will, it is usually the case that a musician, upon signing with a label,

¹² *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] 239 CLR 458.

¹³ *Ibid.*

¹⁴ Above n 7.

¹⁵ Above n 6, 3.

¹⁶ Above n 12, 2.

¹⁷ LexisAdvance, *Halsbury's Laws of Australia* (at 11 January 2017) Copyright, '(F) Licences – Assignment of Copyright' [240-2092].

¹⁸ *Copyright Act 1968 (Cth)* s 33(2).

¹⁹ Rolling Stone, 'Freddie Mercury: 10 Things You Didn't Know Queen Singer Did', <<https://www.rolling-stone.com/music/lists/freddie-mercury-10-things-you-didnt-know-queen-singer-did-w451918>>.

assigns their rights in the recording contract.²⁰ Hence, the music label EMI may be able to bring an action for infringement. Freddie Mercury also has moral rights in the song and if they have been infringed, his personal representative would be able to exercise those rights and bring a claim for copyright infringement on his behalf.

A *Moral rights*

Moral rights “protect the reputation of the creator in connection with their copyright material”²¹ The three main categories of moral rights include the right of attribution, the right to not be falsely attributed and the right of integrity.²² Moral rights apply to literary works,²³ making it relevant here, and the author of a work does not need to register in order to be protected under the Act – this is automatic and the period of protection lasts for as long as copyright protection does.²⁴

Here, the most relevant form of moral rights protection is the right of integrity; “the creator’s right not to have his or her work subjected to “derogatory treatment”.”²⁵ Derogatory treatment is “the doing of anything, in relation to the work, that results in a material distortion of, the destruction or mutilation of, or a material alteration to the work that is prejudicial to the author’s honour or reputation”²⁶ or “the doing of anything else in relation to the work that is prejudicial to the author’s honour or reputation.”²⁷

Derogatory treatment of a literary work is anything that results in a material distortion or mutilation of work or anything that is prejudicial to the honour or reputation of the work.²⁸ This involves both an objective determination of whether the new work is prejudicial to the original author, and a subjective element of what the author believes is prejudicial, as O’Brien J stated in *Snow v Eaton Shopping Centre*.²⁹ Here, without the luxury of knowing what Freddie Mercury might have thought of the video, it is unclear whether this video infringes his moral rights. It could be the case that it does infringe on his moral rights, as it creates an association with Freddie Mercury that he may have

²⁰ Above n 12, 7.

²¹ Australian Copyright Council, ‘Moral Rights’, <https://www.copyright.org.au/acc_prod/ACC/Legal_Advice/Manage/Precedents/009_Moral_Rights.aspx>.

²² Ibid.

²³ Australian Copyright Council, ‘Moral Rights’ November 2014, 1-2.

²⁴ Above n 23, 2-3.

²⁵ Above n 23, 4.

²⁶ *Shostakovich v Twentieth Century Fox Film Corp* (1952) DA 1954, 1681 (France); *Shostakovich v Twentieth Century Fox Film Corp* 80 NYS 2d 575 (1948) (US).

²⁷ *Copyright Act 1968 (Cth)* s 195AK.

²⁸ *Copyright Act 1968 (Cth)* s195AJ.

²⁹ *Snow v Eaton Shopping Centre Ltd* (1982) 70 C.P.R. (2d) 105.

thought trivialised his work, much like the case in *Snow*, and it could be possible that it creates an association between the creators of the video and Freddie Mercury or Queen that is prejudicial to the author's reputation or honour. It could also be the case that the video celebrates the song, presenting it in a new light and thus, celebrating Freddie Mercury's reputation. Moreover, the video itself urges its viewers to watch the original video.³⁰ It does not make scathing comments about the band, nor does it really destroy the song or its reputation. As mentioned previously, the video is more of an interpretation of the lyrics, potentially celebrating it rather than degrading it or its creators.

Thus, as outlined above, copyright is clearly established in the song. Copyright subsists in the song as a literary work. There are potentially multiple owners of copyright in the literary work – Freddie Mercury and his musical label EMI. Further, Freddie Mercury as the author enjoys moral rights and these can be exercised by his personal representative. With this established, we can now focus on the video and whether it infringes on the song.

IV INFRINGEMENT

Infringement of a copyright protected work occurs where a person who is not the copyright owner, and without the consent of the copyright owner, does or authorises the doing of an act which is one of the exclusive rights of the copyrighted owner in Australia in relation to the whole or substantial part of the copyright work.³¹ Hence, copyright infringement occurs “if there is an unauthorised reproduction of the work or if a person purports to be the author of the work by illegally appropriating the fruits of the author's labour by reproducing his work with colourable alterations.”³²

The thought around copyright infringement used to be that anything worth copying was *prima facie* worth protecting.³³ However, this was overturned in *Nationwide News Pty Ltd v Copyright Agency Ltd*, where Sackville J explained that if this test were to be “applied literally, the test would mean that all cases of copying would be characterised as reproducing a substantial part of the work. It is therefore unlikely to be of great assistance in determining whether a particular reproduction involves a substantial part

³⁰ Above n 3.

³¹ *Copyright Act 1968 (Cth)* s 36(1), *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146, [81].

³² *TCN Channel Nine Pty Limited v Network Ten Pty Limited (No 2)* [2005] FCAFC 53, 7.

³³ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 610; *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [14].

of a work or subject matter of copyright.”³⁴

As outlined above, the creators of the video are not the owners of the copyright in the lyrics. They presumably also do not have permission from Freddie Mercury or his label to use the lyrics in their video. The connecting factor to Australia could be that the video is easily accessible online here.

It is clear from case law that the concept of substantiality “was developed with emphasis more on the quality or value of what was taken by the alleged infringer from the protected work than on the quantity of what was taken.”³⁵ Furthermore, “all the species of copyright enjoy a protection which is not limited to infringement by the taking of the whole of the protected subject-matter.”³⁶ The video uses a substantial part of the literary work, as the video creators use all of the lyrics of Bohemian Rhapsody, thereby taking not only the whole quantity of the work, but the whole quality of it too. The exclusive right being infringed could be the adaptation right, the communication right or the reproduction right.

The adaptation right is defined in s 10(1) of the *Copyright Act* and includes making a dramatic version of a non-dramatic literary work (as has occurred here in the video) and making a version of literary work in which a story or action is conveyed principally by means of pictures (and the video could be this). The communication right is also defined in s 10(1) as to “make available online or electronically transmit”, and covers uploading to servers. The lyrics have also been communicated electronically here as they appear in a YouTube video, and is available to the public, both within and outside Australia. The reproduction right is not defined, but takes its ordinary meaning of ‘reproduce’. It is clear under the Act that it should be reproduced in material form, and the Act provides some deeming provisions for reproductions, including making a film of a literary work (or any adaptation of one),³⁷ and converting any work into a digital form,³⁸ and both seem to have occurred here as the lyrics have been used in the video which has been stored on YouTube, a digital form.

Hence, without permission from the relevant owners of the copyright in the literary work, the making of the adaptation and the communication of the adaptation may be infringing conduct for the purposes of s 36 of the Act, and it appears that the video does

³⁴ *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 65 FCR 399, 417-418.

³⁵ *TCN Channel Nine v Network Ten* [2001] FCA 108, [12].

³⁶ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14, [18].

³⁷ *Copyright Act 1968 (Cth)* s 21(1).

³⁸ *Copyright Act 1968 (Cth)* s 21(1A).

indeed infringe on the copyright in the song lyrics.

It is also possible that the video infringes on the copyright in the song as it can be classified as a remix. It uses existing material and combines it with new material (in this case, the original song lyrics with acting and camerawork), thereby creating a new work.³⁹ If it is a remix, to avoid infringement, the creators would need permission from the copyright owner if they are using a substantial part of the first work,⁴⁰ and a substantial part is used.

Hence, it appears that the video infringes on the copyright in the song. But there may be relevant defences applicable here.

V FAIR DEALING

Lord Denning famously stated in *Hubbard v Vosper* that it is impossible to define what fair dealing is:

It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright.⁴¹

In Australia, the fair dealing defence comprises two limbs: first, that it is a ‘dealing’ as contemplated in the Copyright Act, and second, that it is ‘fair’. It has been stated that “fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept.”⁴² As provided for in the Australian Copyright Act, the first limb of the defence includes the following dealings; research, study, criticism or review, reporting the news, use of the work in judicial proceedings, and parody or satire.

It was stated in the explanatory memorandum for the Copyright Amendment Bill

³⁹ Australian Copyright Council ‘Mashups, Memes, Remixes & Copyright’, December 2014, 1.

⁴⁰ Ibid.

⁴¹ *Hubbard v Vosper* [1972] 1 All ER 1023, 1027.

⁴² Above n 34, [66].

that the Copyright Act should be amended to ensure that copyright laws kept “pace with developments in technology and rapidly changing consumer behaviour”⁴³ and recognised “reasonable consumer use of technology to enjoy copyright material; Australian consumers should not be in a significantly worse position than consumers in similar countries.”⁴⁴ The Attorney-General in his second reading speech also emphasised the importance of copyright law keeping up with changing technology, and that “the internet and digital technologies have created new challenges and opportunities affecting copyright.”⁴⁵ Thus, the new ‘dealing’ exceptions were introduced:

There are also new exceptions to provide flexibility to allow copyright material to be used for certain socially useful purposes, where this does not significantly harm the interests of copyright owners. The bill also provides for an exception to allow cultural and educational institutions and certain individuals to make use of copyright where that use does not undermine the copyright owner’s normal market. This will provide some of the benefits that the fair use doctrine provides in the United States under their law... A further exception promotes free speech and Australia’s fine tradition of satire by allowing our comedians and cartoonists to use copyright material for the purposes of parody or satire.⁴⁶

For the Literal Bohemian Rhapsody video, the only ‘dealing’ the creators can rely on is parody or satire. Parody and satire are protected under s 41A of the Act, but these concepts have not been defined in the Act itself. Australian Courts have also not considered the parody defence at length. The Macquarie dictionary definition offers some assistance, providing that a parody contains a humorous element,⁴⁷ and Conti J has expressed that “the essence of parody is imitation.”⁴⁸ The explanatory memorandum of the amending bill also states that a parody “involve[s] holding up a creator or performer to scorn or ridicule. Satire does not involve such direct comment on the original material but [uses] material for a general point.” In the United States, a parody could also comment on the original creator, not necessarily ridiculing them.⁴⁹ Further, a “parody needs to mimic an original to make its point, and so has some claim to use the creation of

⁴³ Explanatory Memorandum, Copyright Amendment Bill 2006, 1.

⁴⁴ Ibid.

⁴⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 2006, (Philip Ruddock, Attorney-General).

⁴⁶ Ibid.

⁴⁷ *Macquarie Dictionary* (online ed, at 3 May 2018) ‘Parody’.

⁴⁸ *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCA 146, 473.

⁴⁹ Jani McCutcheon, ‘The New Defence of Parody or Satire under Australian Copyright Law’ (2008) 2 *Intellectual Property Quarterly* 164, 168.

its victim's... imagination."⁵⁰ It is also thought that the "distinction between parody and satire is in parody's requirement for imitation. Parody is a vehicle of criticism delivered by imitating another text [whereas] satire is not restricted to the imitation, distortion or quotation of other texts."⁵¹

Here, a possible hurdle for the creators of the video is how their video can be categorised. Whether this can be a parody is debatable. It may be that it is a parody, given that it possibly pokes fun or makes a comment on the original work. Even if it does not alter the lyrics in a humorous way, their delivery may be enough to prove that it is a parody. Further, if a parody twists an original work into a new concept for people's entertainment,⁵² the video can be described as a parody, given that it is for entertainment purposes and posted on YouTube in the entertainment category.⁵³ It seems more likely that it is a parody than a satire, as the video cannot reasonably be seen as making a general point, unless it is interpreted in such a way as to comment on crime, the police or family as those themes appear in the video. But even if one could reach the conclusion that the video makes a point on those themes, it seems a stretch. There seem to be some risks here for the creators if they cannot categorise their video comfortably in either the parody or satire category, but if the Court finds that the video constitutes either a parody or a satire, the creators would escape copyright infringement as the video is one of the 'dealings' contemplated in the Australian Copyright Act.

The creators of the video could comfortably satisfy the second limb of the fair dealing defence; they can demonstrate that it is 'fair' within the meaning of s 40(2) of the Copyright Act. Whether the use of a work is 'fair' "is to be judged objectively in relation to the relevant purpose".⁵⁴ As the purpose of using the lyrics was to create a video for entertainment purposes, not for commercial gain (i.e. posting the video on YouTube was to entertain, and not to primarily make a profit from advertising revenue or other means). The lyrics are widely available and are used in many other online videos, including covers of the original song. Using the lyrics in the video also does not affect the potential market or value of the lyrics, given that they are so widely known and recognisable. Thus, it could reasonably be conceived that the court could find the video to satisfy the 'fair' requirement of fair dealing.

⁵⁰ Above n 49, 169; *Acuff-Rose Music Inc v Campbell* (1994) 510 US 569.

⁵¹ Maree Sainsbury, 'Parody, satire, honour and reputation: The interplay between economic and moral rights' (2007) 18 *Australian Intellectual Property Journal* 149, 153.

⁵² Australian Copyright Council, 'Parodies, Satire & Jokes', December 2014, 4.

⁵³ Above n 3.

⁵⁴ *TCN Channel Nine v Network Ten* [2001] FCA 108, [66].

VI FAIR USE

If this case was brought in the United States, defending a claim for copyright infringement would be different to the process above. In the United States, they have a fair use defence, contained in s 107 of the United States Copyright Act. The inquiry in the United States is unlike the Australian approach, as there is no real need to categorise the new work into a specific 'dealing'. However, there is an extensive discussion as to what constitutes 'parody' in American jurisprudence.

It was stated in *Campbell v Acuff-Rose* that the threshold question when considering whether something is a parody for the purposes of section 107 is whether a parodic character may reasonably be received, and that "the only further judgment that a court may pass on a work goes to an assessment whether the parodic element is slight or great and the copying small or extensive in relation to the parodic element, for a work with slight parodic element and extensive copying will be more likely to merely supersede the objects of the original than to constitute a fair use."⁵⁵

In *Bourne Co. v. Twentieth Century Fox Film Corp.*, it was stated that a parody:

[M]ust be able to conjure up at least enough of that original to make the object of its critical wit recognizable. This stems from that fact that parody's humor necessarily springs from recognizable allusion to its object through distorted imitation. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which a song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.⁵⁶

Despite the discussion as to what a parody is, the focus of the fair use inquiry is directed to the factors stipulated in s 107(1), including:

[T]he purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the

⁵⁵ 510 U.S. 569 [15].

⁵⁶ *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499 [13].

copyrighted work.⁵⁷

On the face of it, these factors are similar to the Australian ‘fairness’ factors outlined in s 40(2) of the Australian Act. They both consider the nature of the copyright protected work, commercial repercussions of appropriating the original work and the portion of the original work used. A difference is that the Australian approach takes into account the purpose and character of the ‘dealing’, and whether the original work could have been obtained in a reasonable time at an ordinary commercial price. These do not appear in the American approach.

Delving more into the American factors, it appears to be that the process for establishing a fair use defence is tailored to the circumstances of the case. The courts take into account additional factors including whether the use of the copyrighted work is a ‘transformative’ one (whether it adds something new to the original work) – the more ‘transformative’ the new work is, the easier it is to establish the defence.⁵⁸ If the original work is more factual, it is easier to claim fair use than if the original work is more creative or imaginative.⁵⁹ Furthermore, the Courts take into account whether the part taken from the original work is a substantial part – and the law on this point is much the same as that in Australia; it is a qualitative assessment, rather than a quantitative one, and if the new work only uses a numerically insignificant part of the copyrighted work, if that tiny part goes to the heart of that work, it would constitute a substantive part.⁶⁰ Furthermore, importantly in the context of music, it is accepted by American courts that it is difficult to make a parody of a musical work without resorting to copying.⁶¹

Hence, under the American position, the previous hurdle of whether the video is a parody or satire would be removed, and the inquiry would instead be directed to whether the use of the lyrics is fair. This would be easily and readily demonstrated, as like above, the lyrics are used for public entertainment, rather than for a commercial purpose. While the lyrics are creative and imaginative and a substantial part is used in the video, the video itself adds something new to them and transforms the original work

⁵⁷ 17 USC § 107.

⁵⁸ U.S. Copyright Office, *More Information on Fair Use*, <<https://www.copyright.gov/fair-use/more-info.html>>.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*; see also the Australian position: *Telstra Corp Ltd v Royal & Sun Alliance Insurance Australia* (2003) 57 IPR 453; *AGL Sydney Ltd v Shortland County Council* (1989) 17 IPR 99; *SW Hart & Co Pty Ltd v Edwards Hot Water Systems* (1985) 159 CLR 466; *Dixon Investments Pty Ltd v Hall* (1990) 18 IPR 490; *Tamawood Ltd v Habitare Developments Pty Ltd (admin apptd) (recs and mgrs. apptd) (No 3)* (2013) 101 IPR 225.

⁶¹ *Fisher v Dees* 794 F 2d 432.

into something creative and imaginative.⁶² So it is conceivable that under American copyright law, the creators could easily and successfully raise the fair use defence and escape copyright infringement.

It is useful to note that the inquiry under American copyright law “permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster. The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”⁶³ Thus, it demonstrates how fair use is considerably broader and easier to apply than fair dealing.

However, fair use has not been immune to criticism and has been dubbed “the most troublesome [doctrine] in the whole of copyright”,⁶⁴ and it is understandable as to why this is the case. The American Copyright Act is open for interpretation and there is no guidance provided in the Act as to how the factors in s 107 should be weighed up. This leaves the application of the doctrine incredibly wide and flexible. This may frighten those looking for certainty in the law, and in the United States, it has been said that “the parody defense has careened from one dispositive factor to another, leaving the courts, commentators and, presumably, would-be parodists, in considerable confusion.”⁶⁵ Even so, the flexibility of the fair use doctrine could be of great relief to the party bringing a claim of fair use, and particularly as the concept of ‘transformation’ has not been fully defined there would be some wiggle room to argue their case.⁶⁶ Furthermore, judicial discretion is nothing new, so this should not be of grave concern in Australia with the way the law of precedent operates.⁶⁷

A *Fair Use in Australia*

The Attorney-General’s Department’s inquiry into fair use and its applicability in Australia was published in 2005. It noted that “copyright law promotes creativity and innovation... by providing exclusive economic rights to copyright owners to control certain uses of their works. At the same time, copyright law also seeks to promote

⁶² *Henley v. DeVore* 733 F. Supp. 2d 1144.

⁶³ Above n 56, [7].

⁶⁴ United States House of Representatives, ‘Copyright Law Revision Report No. 94-1476’ (1976), 65.

⁶⁵ Beth Warnken Van Hecke, ‘But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use’ (1992) 77 *Minnesota Law Review* 465, 474.

⁶⁶ Nicholas Lewis, ‘Comment: Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualised Forms of Music and Art?’ (2005) 55 *American University Law Review* 267.

⁶⁷ J C Knapp, ‘Laugh and the Whole World...Scowls at You? A Defence of the United States’ Fair Use Exception for Parody Under TRIPs’ (2005) 33 *Denver Journal of International Law and Policy* 347.

the social benefits that arise from a free flow of knowledge and expression.”⁶⁸ This is why it is important that copyright law provides exceptions to infringement. The issues paper noted that as the law currently stood in 2005, many of the acts permitted in the United States under the fair use exception could be permitted in Australia under either the fair dealing exceptions or through licenses (although there would be some practical differences between fair use in the US and licenses in Australia). It also noted that when it comes to education as a ‘dealing’ exception, the Australian *Copyright Act* gives “Australian educational institutions wider permissions to use copyright material than fair use allows to similar United States institutions”.⁶⁹ It cautioned the add on of a fair use defence, as “the relationship of such a provision to other exceptions and statutory licences in the *Copyright Act* would be carefully considered to avoid problems arising from any overlap and consequent disruption to existing business and licensing arrangements.”⁷⁰ One option they considered for copyright law reform was to add further specific exceptions to the ‘dealings’. This, they stated, “would not allow a court to decide whether a new or minor use should qualify”⁷¹, and “would maintain current policy of providing certainty for copyright owners and users as to permitted acts, while updating the *Copyright Act* to include other uses including common consumer practices that do not cause significant harm to copyright owners.”⁷²

The Australian Law Reform Commission later conducted its own inquiry into whether fair dealing could be expanded to include more ‘dealings’ or whether fair use should replace fair dealing altogether. Ultimately, they found that fair use was favourable, as it assists innovation – for if creatives are unclear about what material they can use and whether they can exclusively exploit their rights under the Australian Act, they will be discouraged from creating and distributing new works.⁷³ Fair use is technology-neutral and can be easily applied to new developments in technology and commercial practice.⁷⁴ This shows that it is flexible, and surprisingly the Commission concluded that it is sufficiently certain as “the test of fairness is also not novel in Australian law. The existing fair dealing exceptions require the application of a fairness test and the fairness factors that the ALRC is recommending are substantially the same as those currently

⁶⁸ Attorney-General’s Department, *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age*, Issues Paper, (May 2005) [2.6].

⁶⁹ Above n 68 [13.5].

⁷⁰ Above n 68 33 [13.6].

⁷¹ Above n 68 34 [14.10].

⁷² *Ibid.*

⁷³ Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013), 107.

⁷⁴ Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013), 95.

provided in the fair dealing exceptions for research or study. In addition, substantial guidance can be obtained from overseas case law and academic commentary.”⁷⁵

The Australian Productivity Commission also recommended the adoption of fair use, stating that fair dealing is too narrow and prescriptive and does not “reflect the way people today consume and use content in the digital world, and [does] not accommodate new legitimate uses of copyright material.”⁷⁶ They also determined that the “current scope and protection of copyright protection is weighed too heavily in favour of copyright holders, to the detriment of the long-term interests of the Australian consumers and the community.”⁷⁷ Interestingly, the Productivity Commission produced a table in their 2016 report illustrating just how many situations could potentially infringe copyright under a fair dealing system and under a fair use system.⁷⁸

A ‘flexible dealing’ approach has been suggested as an option, and it may be useful in Australia. The ‘flexible dealing’ model could ensure that courts “assess a particular use *by reference to the underlying principles of copyright protection* rather than subjectively as ‘matters of impression and degree’.”⁷⁹ This could be useful in not only providing some light on established copyright principles, but ensuring that the law could evolve with changes in technology.

Relevantly, for Literal Bohemian Rhapsody, the adoption of fair use could circumvent the issue of whether the video and other ones like it, fit within the concept of ‘parody’ or ‘satire’. This was evidently a problem in The Panel cases, where the use of copyrighted material did not fit neatly in the ‘criticism or review’ dealing category.⁸⁰ Hence, the American fair use exception could be a viable option for a reform of Australian copyright law given that the Australian fair dealing exception is restrictive, rigid and unable to adapt to new developments in technology without legislative intervention.

VII CONCLUSION

The song ‘Bohemian Rhapsody’ is clearly protected by copyright. The creators of

⁷⁵ Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013), 113.

⁷⁶ The Australian Government Productivity Commission, ‘Intellectual Property Arrangements Productivity Commission Final Report’ (December 2016), 165.

⁷⁷ The Australian Government Productivity Commission, ‘Intellectual Property Arrangements Productivity Commission Final Report’ (December 2016), 31.

⁷⁸ The Australian Government Productivity Commission, ‘Intellectual Property Arrangements Productivity Commission Final Report’ (December 2016), 170.

⁷⁹ Ben Mee, ‘Laughing Matters: Parody and Satire in Australian Copyright Law’ (2010) 20 *Journal of Law, Information and Science* 61 [4.43].

⁸⁰ Nicolas Suzor, ‘Where the Bloody Hell Does Parody Fit in Australian Copyright Law?’ (2008) 13 *Media and Arts Law Review* 218, 235.

the video ‘Literal Bohemian Rhapsody’ potentially infringe on the copyright in the song lyrics as they have appropriated the literary work and adapted it, communicated and reproduced it presumably without permission of the copyright owners. However, the video creators can successfully raise the defence of either fair dealing or fair use. Fair dealing can be established as it is clear that the use of the lyrics in the video is ‘fair’, but there may be difficulties in establishing the video is a parody or a satire. Fair use then becomes the preferable defence for the creators of the video as it would not be necessary to establish the video is a parody or a satire.

It then becomes clear that the differences between fair dealing and fair use are particularly important for those wishing to rely on these defences. Fair dealing is particularly restrictive and does not readily adapt to new developments like fair use does. It may then be appropriate to consider whether the fair dealing defence we have in Australia should be replaced by the American fair use doctrine, and the Australian Law Reform Commission and the Australian Productivity Commission cite very sound reasons for this change. Changing the fair dealing defence is particularly important in this internet-driven era where information and expressions of ideas are so readily available and easily appropriated. Adopting a fair use defence in Australia could be the solution to balancing the competing interests of the creators who want to protect their expressions and the wider public who should be able to access and use works in order to innovate and progress as a society. Copyright rules therefore must morph and adapt to suit new situations, both societal and technological.