# Underlying Rationales of Fair Use: Simplifying the Copyright Act

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## Underlying Rationales of Fair Use

In early 1997 the Copyright Law Reform Committee (CLRC) released a discussion paper, titled, " Simplification of the Fair Dealing Provisions of the Copyright Act 1968 ". The core proposal of the issues paper[1] was that the provisions of the Copyright Act relating to fair dealing could be simplified, in the sense of being reduced in length, by the adoption of a single provision along the lines of the section 107 of the US Copyright Act 1976 (17 USC). I made a submission to the CLRC on the issue, suggesting, one should understand the underlying rationales of s 107 before adopting it as a model for change.

Section 107 embodies the essence of US copyright law and in a more general sense the American psyche, in balancing economic exploitation of copyrightable informational products with free speech (including use of information and free competition). It is this context, in which s 107 should be analysed as a model for change.

My submission was that the CLRC should look much more closely at the fundamental principles which inform s 107 (17 USC), and then reflect upon the suitability of the section for Australian conditions. As s 107 is a broad ranging thematic type provision it is vital in understanding its operation to appreciate its motivating premises; its themes. There are at least three principles which are fundamental to the understanding of s 107:

*Utility* - the idea that copyright law acts to encourage creativity in the name of public welfare, through the reward of guaranteed financial gain in the form of a monopoly to the point where it is effective to do so; beyond this point fair use doctrine arises to remove the monopoly and avoid ineffectiveness;

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1 See "Simplification of the Fair Dealing Provisions of the Copyright Act 1968", para 12.

*Free Speech/Use* - the notion that information should be freely available to augment the personal, intellectual and monetary wellbeing of individuals;

*Private Immunity* - the concept that a narrowly defined private sphere of life, for example, the home, is immune from government regulation, which in the context of copyright translates to the notion that home copying is fair use.

## Utilitarian Imperatives: Wealth Maximisation

The guiding premise of American copyright law is the utilitarian ethic that legal protection of copyright material is needed to advance public welfare because it fosters creative genius/product which can in turn be distributed for the good of the general public[2]. In one of the leading articles on fair use Professor Fisher of the Harvard Law School explains the utilitarian foundations of copyright law, and in particular fair use doctrine, in terms of the modern utilitarian discourse of Law and Economics. Fisher explains that (my paraphrasing):

...works of the intellect are public goods, it is difficult to deny access to them and they are easy to copy. Thus creative works may well be worth more than one can recover for them and thus will not be produced. To avoid this inefficiency creators of intellectual property are given property rights in their creations thereby giving them a power over the use of the public good; a monopoly. However to the extent that consumers regard other intellectual products as only imperfect substitutes for a particular copyrighted work, the holder of copyright faces a downward sloping demand curve for the right of access to his work and under such conditions to maximise profits will continue granting access to his work only up to the point where the marginal revenue he reaps from affording access to an additional consumer equals the marginal cost, while at the same time charging a price substantially higher than his marginal cost. Adoption of the foregoing strategy will have two economic consequences, first he will reap a monopoly profit; in other words money that would have remained in the pockets of consumers had the work been priced at the level at which the marginal cost of producing it equalled the demand, will now go into the pockets of the copyright owner. Second consumers who value the work at more than its marginal cost but less

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2 *Sony Corp of America v Universal City Studios Inc*, 464 US 417 at 429-32 (1984).

than its monopoly price will not buy it. The former effect is usually thought to have no predictable impact on allocative efficiency. The latter, however results in a deadweight loss, measured by the total of consumer surplus that would have been reaped by the excluded consumers and the producer surplus that would have been reaped by the copyright owner had he sold the work to them. The goal of s 107 in a utilitarian law and economic sense is to maximise the gap between maximum monopoly profits and minimum deadweight losses; to maximise efficiency and eliminate monopoly losses.[3]

For Fisher then, s 107 works to maximise wealth or utility and avoid market failure[4], by legislating a mechanism through which one can have maximum monopoly profits and minimum deadweight losses. In plain English: to give the copyright owner only so much of a monopoly as is needed to maximise monopoly profits with the least possible incursion of deadweight or consumer losses, to obtain the highest net sum.[5] In this view s 107 is seen very much as a battle ground for the economic imperatives of copyright owners and users. While the utilitarian approach is tempered by other rhetoric it remains a dominant theme of US copyright law.[6]

## Free Speech/Use Imperatives

Free speech, constitutionally guaranteed by the First Amendment, looms large in the American psyche, as does the notion of free competition/use which is embodied in American antitrust law (at base the idea that commodities should be freely available for use, in the communication area that the building blocks of discourse viz. information, should be freely available for use, which involves questions of the scope of the public domain). The word "free" in both cases is seen in

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3 William Fisher III, "Reconstructing the Fair Use Doctrine" (1988) 101 *Harvard Law Review* 1659 pp 1700-1704.

4 Gordon, W, "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors" (1982) 82 *Columbia Law Review* 1600, see also, Gordon, W, "Of Harms and Benefits: torts, restitution and intellectual property", (1992) 21 *Journal of Legal Studies* 449, "Assymetric market failure and prisoner's dilemma in intellectual property", (1992) 17 *University of Dayton Law Review* 853, "On Owning Information: Intellectual Property and a Restitutionary Impulse", (1992) 78 *Virginia Law Review* 149.

5 See Landes, W, and Posner, R, "An Economic Analysis of Copyright Law" (1989) 18 *Journal of Legal Studies* 325.

6 see further Goldstein, P, *Copyright's Highway*, Hill and Wang, 1994, Chapter 5; Gordon, W, already cited n 4.

opposition to the notions of "control" or "monopoly". Section 107 is seen by Supreme Court of the USA, to in part, reconcile copyright with free speech/use.[7] In this sense s 107 becomes a battle between the economic imperatives of the creator and the free speech/use of information to prosper society in personal liberty, intellectual and monetary terms.[8]

In broader perspective s 107 might be more accurately conceptualised as the balance between economic exploitation and free speech (in an abstract sense, including some notion of free use/competition).

## Public/Private Imperatives

There is also a strong resistance in the USA to impose a copyright regime on a narrowly defined private sphere of life: eg copying of information for non economic reasons in the home.[9] This strong desire to keep the home or some narrowly defined sphere of life, sacrosanct and immune from government regulation finds clearest definition in the constitutional decisions of the Supreme Court concerning privacy[10] and most probably informs s 107. The general theme is that the idea of copyright police looking for "tell tale" signs of infringement in the home is repulsive.[11]

## General Nature of the Statutory Provision

As is intimated but not fully articulated in the CLRC Issues Paper, as the doctrine of fair use is "an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts, ....there is no disposition to freeze the doctrine in statute".[12]

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7 *Harper & Row Publishers Inc v Nation Enterprises* 471 US 539 (1985); *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994) note particularly the issue of parody and the notion of "transformative use"; Goldstein, already cited n 6, p 21.

8 Gordon, W, "A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual property" (1993) 102 *Yale LJ* 1533; Litman, J, "The Public Domain" (1990) 39 *Emory LJ* 965; J. Boyle, Shamans, Software, Spleens: *Law and the Construction of the Information Society*, Harvard University Press, 1996.

9 See generally Goldstein, already cited n 6, especially Chapter 4.

10 See for example, *Griswold v Connecticut* 381 US 479 (1965), *Stanley v Georgia* 394 US 557 (1969).

11 Goldstein, above n 6, pp 129-30, see more generally *Griswold* above n 10.

12 See legislative history of s 107, House Report No. 1476, 94th Congress, 2d Sess. 65-66 reprinted in 1976 U.S. Code Cong. & Ad. News 5659 at

Note however that s 107 for all its generality is still a compromise.[13]

Due to the common law nature of s 107 it is important for the success of Australian copyright law reform that all concerned fully appreciate the fundamental premises of the American provision. It would be unproductive to undertake a wholesale adoption of s 107 unless its guiding premises fit the Australian legal landscape. With some imagination they can, however it must be acknowledged that these underlying rationales are not as strongly evidenced in the Australian legal system (constitutional, competition and copyright laws) as they are in the USA. Whether this will defeat the usefulness of using s 107 as a model for change is something that should invite further debate. I await with interest the CLRC's final recommendations hoping they succeed in reforming our copyright law in an innovative manner.

Postscript: The CLRC report was released in September 1998. The release of Part One of the 'Report on the Simplification of the Copyright Act' is available at:

<http://agps.gov.au/customer/agd/circ/circ20%20report/media_release.html>

5679-80; see generally, Gordon, W, "Property and Tort Responses to Failures in Markets for Intangibles" (1997) 8 *JLIS* 2.

13 Goldstein, already cited n 6, pp 135-139.