Already There, No Need for a Novel 'Fair Use' Amendment to the *Copyright Act 1968* (Cth)

By: Devin Klassen[1]

Abstract:

The question of whether to amend the *Copyright Act 1968* (Cth) to expand the fair dealing[2] defence in a vein similar to American copyright legislation, necessarily hangs on the legal-philosophical differences between the two countries. Australia's intellectual property rights law has evolved along a traditional English style of Utilitarian theory concerned with society first and the creator second. The USA's evolution has evolved from a hybrid of Utilitarian and Lockean/Libertarian intellectual property theories. Since 1968 the Australian fair dealing copyright law has mirrored its American counterpart provision with the exception in determining what 'fair' in 'fair dealings' extends to. Where the American legislation gives the same four guidelines to each category that can qualify for a fair use protection, the Australian counterpart only matches those guidelines where fair dealing is used for research or study. This submission argues that the Australian intellectual property tradition is fundamentally utilitarian in its perspective. And that by having already adopted the American guidelines for the study and research category of fair dealing under section 40(2), the *Copyright Act 1968* (Cth) should be amended to apply those guidelines to the rest of the categories for the interest of public information, review, reporting, and criticism.

PART I – FRAMING THE DIFFERENCES

1. OUTLINING THE INTELLECTUAL PROPERTY PHILOSOPHIES OF AUSTRALIA AND THE USA

1.0 Framing the Context

This submission's reasoning is directly affected by the degree to which the USA differs from Australia regarding the philosophical foundations that underpin each countries' approach to Intellectual Property Rights (IPR). Covered here in Part I are the two most prominent foundations, although influence from other theories is found to some degree throughout both countries.[3] Much of the framing of the issue as between the USA and Australia is found in the philosophical foundations

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[1] BA Philosophy and Political Science, University of British Columbia.

[2] *Note the terms 'fair dealing' and 'fair use' may be used interchangeably and are Australian and American variants*

[3] William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed*), New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001), 174. ('*Theories of IP*'); Sutherland, J, 'Representation of indigenous peoples' knowledge and practice in modern international law and politics', (1995) 2(1) *Australian Journal of Human Rights*, 39.

for IPR being either, on the one hand, the Utilitarian Theory (UT), and on the other the Lockean Labour Theory (LLT). For the purposes of this submission, UT is taken to be the classical Benthamist position where IPR are encouraged only so far as it causes a net benefit to the society.[4] LLT on the other hand stems from John Locke and natural law theory wherein a person is unalienably entitled to enjoy the product of the efforts of their labour.[5] Uniting both Australia and the USA is perhaps the single most historically important piece of legislation regarding IPR, the *Statute of Anne 1710*.[6] While Australia was not formally discovered by 1710, and the USA was still 65 years from declaring independence, the American colonial adoption is comparable with the transplantation of the same on the Australian continent nearly 100 years later. Therefore, the USA and Australia have developed their individual IPR laws as a genesis from the same stalk.[7] From here the differences begin to emerge.

1.1 Defining the Australian IP Stance

Australia's approach to IPR starts with the *Statute of Anne 1710* (UK). This early period dominated and influenced the history of IPR legislation in Australia and maintained the main influence for decades.[8] The idea that Australian IPR law has continued along the UT path has been expressly recognised by the Intellectual Property and Competition Review Committee as recently as the year 2000.[9] While not of any notable importance by itself, Australia's continual UT approach to IPR may affect the applicability of concepts such as determining the scope of what is 'fair' in fair use clauses. This is doubly important when considering drafting amendments in inspiration from a place such as the USA which is less than staunchly UT in its IPR approach.

1.2 Defining the American IP Stance

Not only Australia but in the USA, the *Statute of Anne* is critical to the origins of IPR and is often cited as an example of the UT approach to IPR.[10] However, the inspiration of American independence, including the Constitution, are heavily influenced by the philosophy of John Locke, and most importantly Locke's work *Two Treatises on Government*.[11] Importantly, It is in Locke's *Two Treatises on Government* that much of the LLT has its foundation.[12] What has evolved is some hybrid system that appears to have started firmly along UT grounds with the *Statute of Anne,* but then experienced a conversion, if partially, by the sway of the libertarian philosophies of John Locke. On the UT side of the spectrum, William Fisher notes the purpose behind the *copyright clause* as found in the American Constitution is one of stimulating valuable intellectual efforts for the betterment of society.[13] Fisher also mentions the 'almost as common' references of LLT as

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[4] 'Intellectual Property: 3.2 The Utilitarian Incentives-Based Argument for Intellectual Property', *Stanford Encyclopedia of Philosophy*, (Web Page, 10 October 2018) < https://plato.stanford.edu/entries/intellectual-property/#UtilInceBaseArguForInteProp>.

[5] John Locke, *The Second Treatise of Government* (Cambridge University Press, 1988), 9.

[6] *Statute of Anne 1710* (UK).

[7] Oren Bracha, 'The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant', (Summer 2010) 25 *Berkeley Technological Law Journal* 3, 1459.

[8] Sarah Ailwood, Maree Sainsbury, 'Copyright Law, Readers and Authors in Colonial Australia', (2014) 14 *Journal of the Association for the Study of Australian Literature* 3, 2.

[9] Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (Report, September 2000) 61.

[10] Ibid 1442.

[11] Eric Forner, *Volume 1: Give Me Liberty! An American History* (Norton & Company, 2006), 127.

[12] 'Intellectual Property: 3.3 Lockean Justifications of Intellectual Property', *Stanford Encyclopedia of Philosophy*, (Web Page, 10 October 2018) < https://plato.stanford.edu/entries/intellectual-property/#LockJustInteProp>.

[13] *Theory of Property*, 173; *United States Constitution* art I § 8; *Campbell v Acuff-Rose* (1994) 114 S Ct 1164.

found in law reform commissions on copyright law,[14] and from judgments of the Supreme Court.[15] It is in this hybrid UT and LLT framework that section 107 of the *Federal Copyright Act 1976* (USA) must be considered.

PART II – SIMILARITY AND NEED

2. EXISTING PROVISIONS: FAIR USE AS FAIR DEALING

2.1 The American Fair Use Provision

Section 107 of the *Federal Copyright Act* (USA) contains a copyright exception for the use of another's otherwise protected works under the defence of fair use.[16] The fair use provision prevents a copyright holder from pursuing the user of their works so long as the use is done under a prescribed category. The prescribed categories being: circumstances of criticism, comment, news reporting, teaching, scholarship, and research.[17] Additionally, where a court is asked to adjudicate whether a use has been 'fair', the court will weigh four requirements.[18] For the use to trigger the exception, the court will consider the purpose of the use. The court will consider whether the use was for commercial or non-profit reasons.[19] And, the court will also take into account the nature and circumstances of the copyrighted work, whether only part or all of the work has been reproduced, and whether the use of the work will affect the work's potential market value.[20] The final consideration, whether the copyrighted work's value will be affected, appears to be an LLT style concern regarding the impact such a use will have on the creator, rather than a UT concern on the impact of the society. This fourth concern demonstrates that the fair use clause is not solely concerned with access of the public to information but is also concerned with the rights of the owner. This LTT concern poses a philosophical issue on whether it can be transposed into a UT dominated Australian system.

2.2 The Australian Fair Dealing Mechanism

As section 107 of the *Federal Copyright Act* (USA) provides, so too does the *Copyright Act 1968* (Cth) provide. Unlike its American counterpart, the *Copyright Act 1968* (Cth) uses the term 'fair dealing' instead of 'fair use' and spreads the exception among different sections in the act.[21] Just as with the American act, provisions protecting research and study,[22] criticisms and fair review,[23] satirical or parody use,[24] news reporting,[25] and legal advice,[26] are all found as exceptions in the act. Unlike the American act, the *Copyright Act 1968* (Cth) does not include a set of

[14] *Theory of Property*, 174; George S Grossman, *Omnibus Copyright Revision Legislative History*, vol 5 (1976), 100.
[15] Ibid.
[16] *Federal Copyright Act* (USA) s 107.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Australian Law Reform Commission, *Copyright and the Digital Economy* (Discussion Paper No 79, July 2013) 131–149.
[22] *Copyright Act 1968* (Cth) ss 40(1), 103C(1).
[23] Ibid ss 41, 103A.
[24] Ibid ss 41A, 103AA.
[25] Ibid ss 42, 103B.
[26] Ibid s 43(2).

considerations for the court when adjudging a fair dealings defence. While the American system has its four-part guidelines for adjudicating a fair use defence, the *Copyright Act 1968* (Cth) vaguely requires the use to be 'fair' without defining it which results in a narrower application than its American counterpart.[27]

2.3 Mitigating the Differences

The Australian approach to 'fair dealing' has mirrored the same categories as found in its American 'fair use' counterpart. The difference lies in how fairness is to be determined. Lacking legislative guidelines for the court, the question turns to how the 'fair' part of 'fair dealing' is defined. Courts in similar 'fair dealing' jurisdictions such as the United Kingdom have met defining what 'fair dealing' means with scepticism.[28] However, whether cognisant of it or not, the current copyright legislation of Australia appears to have already tacitly endorsed the American criteria. This answer lies in a section of the *Copyright Act 1968* (Cth). Found in section 40(2) and governing fair dealing only insofar as it relates to research and study, are near identical considerations as found in section 107 of the American act.[29] Just as with the American act,[30] section 40(2) of the *Copyright Act 1968* (Cth) states that when determining whether a use—for research or study— is fair, weight must be given to the purpose and character of the dealing, the nature of the work and adaptation, the reasonable time and ability to obtain a commercial copy, the impact that the use may have on the original works value, and whether part or all of the original work is reproduced.[31] The only difference between the subsection found in the Australian provision of s 40(2) and that of the American provision of s 107, is the Australian provision's additional consideration of whether there was a reasonable ability for work to be purchased under a commercial license. Otherwise, the provisions under consideration in section 40(2) are identical to the broad provisions found in section 107 of the American act; the only issue is that section 40(2) only applies to research and study.

The answer at this point seems to be to transplant or extend the considerations found in section 40(2), so those circumstances apply to the other categories of fair dealing.

3. ARGUMENTS FOR AND AGAINST ADOPTING A GENERAL CRITERIA

In proposing that the expansion of the guidelines of section 40(2) ought to be applied as general guidelines to the rest of the fair dealing categories, the question turns to whether such a move is coherent with the philosophical foundations underpinning Australian IPR legislation. Selected are two of the most prominent arguments, as well as their nominal philosophical alignment, for and against expanding the section 40(2) guidelines to all categories.

3.1 Argument For: Public Interest (Utilitarian Justification)

The public interest argument is a UT position that goes to not only IPR by itself, but also the extent to which fair use or fair dealing should be allowed. The argument is simple, by allowing people to use copyrighted works in a fair way the breadth of knowledge and technology available to

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[27] Peter Brudenall, 'Fair Dealing in Australian Copyright Law: Rights of Access Under the Microscope', (1997) 20(2) *University of New South Wales Law Journal* 443, 445.
[28] *Hubbard v Vasper* [1972] 2 QB 84, 94.
[29] *Copyright Act 1968* (Cth) s 40(2).
[30] *Federal Copyright Act* (USA) s 107.
[31] *Copyright Act 1968* (Cth) s 40(2)(a)–(e).

the society as a whole will be increased as it is not perpetually and wholly locked behind a paywall.[32] Without a broad and flexible fair dealing policy, the concern is that society, especially the least well off, will stagnate or grow at a slower rate as people have to pay for any access to copyrighted materials regardless of context.[33] The argument would then naturally extend to advocate for section 40(2) to be to apply to the rest of the fair use categories as not only would that bring all the categories to the same threshold, but section 40(2) has the most generous guidelines when determining fair use, the others having no guidelines.

3.2 Argument For: Strong Fair Dealings Law Protects Against Economic Monopoly (Utilitarian Justification)

Similar to the open information desire of public interest, there is an argument that economic competition is better suited where fair dealing is broad and protective.[34] Like the public interest argument, this argument comes from a perspective favouring the society as a whole and not the individual rights holder. This economic justification reasons that without strong fair dealing exceptions enshrined in law, IPR protections stifle economic competition by over empowering technologically advanced monopolies contra weaker less IPR rich competition.[35] With stronger protections for fair dealings, the average creator may be able to reference and access protected works at a lesser cost than without the protection and therefore can create new works and compete with fewer resources.[36]

3.3 Argument Against: Broad Fair Dealings Law Waters Down Limited IPR Protection (Lockean Justification)

An argument against expanding section 40(2) outward to cover the rest of the categories may be founded along the lines that a creator's only effective protection is the *Copyright Act 1968* (Cth) and such expansion waters this protection down. This argument stems from the common law fact that there is no history of tort or another offence for either plagiarising—that is passing another's work as your own for your own profit—or infringement—reproducing another's work to profit without permission—.[37] The resulting conclusion of this is that barring certain instances of the tort of passing off, an original creator's only protection is that which is given to her/him under the *Copyright Act 1968* (Cth). This appears in line with the purpose of the act as section 8 expressly denies the subsistence of copyright in any way other than through the act.[38] At its heart, this argument against expanding section 40(2) to the rest of the categories is an appeal from the hypothetical creator or on the hypothetical creator's behalf. Such an appeal puts the individual creator in the primary interest position rather than the society which is an LLT foundational premise. The expansion of 40(2) to cover the rest of the fair dealings categories would then water down the only protection a creator has by weakening the single governing piece of legislation providing protection and alienate creators of their property rights.

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[32] Sir Anthony Mason, 'The Australian Library and Information Association Library Week Oration, State Library of NSW' (1996) 45 *The Australian Library Journal* 81, 89.
[33] Ibid 87; *Stanford Encyclopedia of Philosophy*, (Web Page, 10 October 2018) < https://plato.stanford.edu/entries/intellectual-property/#UtilInceBaseArguForInteProp>.
[34] Peter Brudenall, 'Fair Dealing in Australian Copyright Law: Rights of Access Under the Microscope', (1997) 20(2) *University of New South Wales Law Journal* 443, 453–454.
[35] Office of Regulation Review, *Submissions to the CLRC*, (Submissions: October 1995), 20-1; Robert Cooter, Thomas Ulen, '*Law and Economics*' (Harper Collins, 1988), 134–136.
[36] William Landes, Richard Posner, *The Economic Struct of Intellectual Property Law* (Harvard University Press, 2003), 74–76.
[37] Ibid 62.
[38] *Copyright Act 1968* (Cth) s 8.

3.4 Argument Against: Australian Legal Context is Incommensurate with Broader Fair Dealing Transplantation (Unaligned Justification)

Outside of the limited protections for research and study, this line of argument rejects a fair dealing expansion as being incommensurate or foreign from the Australian legal context. Section 40(2) does emulate section 107 of the American act but this argument rejects that recreation altogether. Except for the need for section 40(2) to allow for growth of study and research, expansion should be rejected because it mirrors a legal provision—the American section 107—that is too different from the Australian legal context.[39] Unlike in Australia, section 107 has evolved in a system with a bill of rights that enshrines freedom of speech and a constitution that articulates the purposes of copyright law.[40] What is implied is that the general rules of section 107 that apply to all fair uses in the USA are supported by a legal system that puts more protection on the expression of a person's ideas. The Bill of Rights and the American Constitution prioritise an individual's ability to express themselves first and foremost and the rights of creators second, an obvious LTT inspiration. Conversely, Australia, on the other hand, does not have a bill of rights, nor does the Constitution articulate the purpose of copyright beyond the Commonwealth's right to legislate the field.[41] Inverting the typical LLT approach, this argument argues that section 40(2) emulates a law designed with particular LLT protections of speech in mind and so does not reflect the philosophy or reality of Australia.

RECOMMENDATION AND CONCLUSION

The philosophical divide underpinning IPR law in both Australia and the USA is important in deciding whether the guidelines found in section 40(2) of the *Copyright Act 1968* (Cth) ought to be expanded to include the other categories of fair dealing. The Australian fair dealing protections, while spread out, mirror the same categories as those found in section 107 of the American *Federal Copyright Act* (USA). Where the difference between the two nations occurs is the guiding principles, or lack thereof, that a court will take weight of when deciding whether a defence of fair use is accepted. In the USA, the guiding principles apply to all categories of fair use while the mirrored provision in Australia applies only to fair dealing in study and research. The two countries' IPR laws come from different legal backgrounds. Australia has developed with little deviation from the traditional *Statute of Anne* utilitarian framework; whereas America saw the hybridisation of the same utilitarian approach but with direct influences of Lockean Labour theory. Critically, in accepting that Australia is essentially UT based and the USA some hybrid, only one argument for and one argument against expansion of section 40(2) merit consideration.

The argument against expanding section 40(2) because it waters down the only protection a creator has, is too fundamentally Lockean to have a direct appeal to the UT based copyright history of Australia. The concern for a UT based system is always the greater society and not the individual creator. On the other hand, the argument for expansion on the grounds that it allows creators to create more things at a lower cost is somewhat contradictory to the original UT idea of IPR. It would be incommensurate to argue that copyright should be protected to incentivise new creation while also arguing that it should be reduced to incentivise cheaper creation. One of those two ideas will result in a net lowering of either quality or quantity for the society and run contra to utilitarian conceptions of IPR law.

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[39] Australian Law Reform Commission, *Copyright and the Digital Economy* (Discussion Paper No 79, July 2013) 76.
[40] Ibid.
[41] *Australian Constitution* s 51(xviii).

The remaining argument for the expansion of section 40(2) is the traditional concern that too strong of IP rights will slow or stagnate growth by starving off access to knowledge and technology. The remaining argument against expansion of section 40(2) is that its origin is too foreign to fit properly within the Australian legal framework, having come from a land of somewhat more Lockean priorities. Ultimately, the argument for expansion must be preferred for a couple of reasons. First, the argument for expansion of section 40(2) to the rest of the fair dealings categories will place each category under the same threshold test ensuring a cohesive and standardized litigation regime. Secondly, the expansion would protect such fair dealings as product reviews, service or art criticisms, and news reporting to a degree that substantially aids the general society's need for more access to information on ideas and the attractiveness of commercially licensed IP entities. The remaining argument against expanding section 40(2) does not hold merit as the fact that the Australian legal framework does not have a Lockean perspective towards maintaining individual expression does not foreclose whether there is a utilitarian argument for the same or alternate reasons.

The guidelines as found at section 40(2) of the *Copyright Act 1968* (Cth) should be expanded into general guidelines that cover all the categories composing fair dealing. No other American importation is needed.

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