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A Submission to the Australian Law Reform Commission on Copyright and the Digital Economy: Open Access

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COPYRIGHT AND THE DIGITAL ECONOMY: OPEN ACCESS



The case of Aaron Swartz has put punitive intellectual property enforcement provisions under the spotlight. Flickr

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BIOGRAPHY

I am an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change. I am an associate professor at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). I hold a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University. I received a PhD in law from the University of New South Wales for my dissertation on *The Pirate Bazaar: The Social Life of Copyright Law*. I am a member of the ANU Climate Change Institute. I have published widely on copyright law and information technology, patent law and biotechnology, access to medicines, clean technologies, and traditional knowledge. My work is archived at *SSRN Abstracts* and *Bepress Selected Works*.

I am the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). I explore the significance of key judicial rulings and consider legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. I have also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2010, and the *Trans-Pacific Partnership*.

I am also the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. I edited the thematic issue of *Law in Context*, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). I was also a chief investigator in an Australian Research Council Discovery Project, 'Gene Patents In Australia: Options For Reform' (2003-2005), and an Australian Research Council Linkage Grant, 'The Protection of Botanical Inventions (2003). I

am currently a chief investigator in an Australian Research Council Discovery Project, 'Promoting Plant Innovation in Australia' (2009-2011). I have participated in inquiries into plant breeders' rights, gene patents, and access to genetic resources.

I am a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (RED) Campaign, the Gates Foundation, and the Clinton Foundation. I am also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012), with Alison McLennan.

I am a researcher and commentator on the topic of intellectual property, public health, and tobacco control. I have undertaken research on trade mark law and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic.

I am the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-Prizes. I am currently working on a manuscript, looking at green branding, trade mark law, and environmental activism.

I also have a research interest in intellectual property and traditional knowledge. I have written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics.

EXECUTIVE SUMMARY

This Submission is based upon work in progress, which has been presented at this forum and published in the form of opinion-editorials:

1. Matthew Rimmer, 'Aaron's Army Fights the Trans-Pacific Partnership', Open Access Research Issues in the Humanities and Social Sciences, the Australian National University, 3 May 2013.

2. Matthew Rimmer, 'Aaron's Army Fights the Trans-Pacific Partnership', *The Conversation*, 8 March 2013, <https://theconversation.edu.au/aarons-army-fights-the-trans-pacific-partnership-12273> and *Delimiter* <http://delimiter.com.au/2013/03/08/aarons-army-fights-the-trans-pacific-partnership/>

RECOMMENDATIONS

In its discussion paper, the Australian Law Reform Commission proposed a broad, flexible exception of fair use. The Commission emphasized that the new fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').

The non-exhaustive list of fairness factors should be: '(a) the purpose and character of the use; (b) the nature of the copyright material used; (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and (d) the effect of the use upon the potential market for, or value of, the copyright material. The non-exhaustive list of illustrative purposes should include the following: (a) research or study; (b) criticism or review; (c) parody or satire; (d) reporting news; (e) non-consumptive; (f) private and domestic; (g) quotation; (h) education; and (i) public administration.

Recommendation 1

The Australian Law Reform Commission's proposal for a broad, flexible exception of fair use is to be welcomed and applauded.

Recommendation 2

The defence of fair use should promote the encouragement of learning, and access to knowledge in its list of fairness factors and its illustrative purposes.

Recommendation 3

In line with Canadian law, there is a need for a broad and liberal interpretation of ‘research’ and ‘study’ in the proposed defence of fair use to ensure that users’ rights are not unduly constrained.

Recommendation 4

The defence of fair use should include education, science, and research as illustrative purposes. Open licensing practices (such as the use of Creative Commons licences) and Open access policies of educational and scientific institutions should be taken into account in determinations of fairness.

Recommendation 5

The defence of fair use should embrace not only government use of copyright works, but also public use of copyright works held by the government. Public administration should be broadly construed to include open access to government works. This recognition would promote the rule of law, access to justice, citizen participation, open government, and the freedom of political communication recognised under the *Australian Constitution*.

Recommendation 6

Like the United States Obama Administration, the Australian Government should expand public access to the results of publicly funded research, science, and educational materials.

Recommendation 7

In light of its membership of the Open Government Partnership, the Australian Government should expand its Open Government policies and practices.

Recommendation 8

The defence of fair use – and future copyright exceptions – should not be constrained by the *Trans-Pacific Partnership* or other trade agreements. Moreover, the Australian Government should resist the further expansion of criminal offences and civil penalties under copyright law. There is also a need to ensure that the *Trans-Pacific Partnership* does not adversely affect open access policies or practices.

AARON'S ARMY FIGHTS THE TRANS-PACIFIC PARTNERSHIP

MATTHEW RIMMER

Introduction

There has been much soul-searching over the death of Aaron Swartz, an American Internet activist.

An advocate for open access to publicly-funded works, Swartz lamented: 'The world's entire scientific and cultural heritage, published over centuries in books and journals, is increasingly being digitized and locked up by a handful of private corporations.'

After downloading articles from the academic website JSTOR at the Massachusetts Institute of Technology (MIT), Swartz was indicted in 2011 by Federal prosecutors on 13 charges, including computer fraud and wire fraud. The United States Attorney Carmen M. Ortiz argued: 'Stealing is stealing whether you use a computer command or a crowbar, and whether you take documents, data or dollars.' Swartz faced lengthy imprisonment, monetary fines, as well as forfeiture, restitution, and supervised release. Swartz took his own life on the 11th January 2013.

The tragic case of Aaron Swartz has led to much debate about the state of intellectual property law and information technology law – especially as he had been a campaigner against the *Stop Online Piracy Act* and the *Protect IP Act*.

1. An Elegy for Aaron Swartz

There has been also discussion of Aaron Swartz in the context of social disobedience. Citing the example of Thoreau, United States Senator Ron Wyden reflected on the case of Aaron Swartz:

Aaron was a hacker. He hacked to promote innovation through openness. Where Aaron saw injustice, he hacked for its remedy. Aaron Swartz hacked Washington. A poorly written law called him a criminal. Common sense and conscience knows better.

There has been a Congressional investigation into the role of the prosecutors in the Aaron Swartz case.

There has been much debate about the role of MIT in the controversy. The educational institution's hard-won reputation for open teaching and open innovation has been somewhat tarnished by its involvement in the prosecution of Aaron Swartz. MIT has commissioned an independent investigation into the matter.

The case of Aaron Swartz is certainly not limited in its significance to the United States. There has been a parallel debate over copyright law and open access in Australia – taking place both in copyright disputes, and policy debates.

In a powerful speech at Harvard Law School on the 20th February 2013, entitled 'Aaron's Laws: Law and Justice in the Digital World', Lawrence Lessig considered the case of Aaron Swartz, and highlighted the need for law reform in a number of areas.

A. Aaron's Laws

First, Lessig applauded the bipartisan efforts by Democrat Representative Zoe Lofgren and Republican Representative Darrell Issa to reform the *Computer Fraud and Abuse Act* 1984 (US) with Aaron's Law. He observed:

Immediately after his death, Zoe Lofgren—you remember her from Aaron's first thought about maybe there is one Congresswoman who might possibly see the idiocy in COICA—Zoe Lofgren wrote to say she intended to introduce something she wanted to call Aaron's Law. But not in Congress. She introduced it first at Reddit. And she asked the people in Reddit to comment on the bill, and there were thousands of these comments, and then she took those comments and redrafted it in light of those comments and now has submitted it. EFF identifies three crucial things any new bill should do. It cannot criminalize violation of private agreements, it must allow people who have access to the information to do it in an innovative way, and the penalties need to be proportionate to the computer crime. They believe this draft bill would work to achieve the first two of these elements.

Orin Kerr and Lawrence Lessig later elaborated on the debate:

Serious invasions of privacy should of course be prosecuted. Punishments for malicious hacking should be swift and strong. But just as bad things can happen online, so too can much good. The law should not confuse the two by labeling innocent conduct a felony. Congress should reject efforts to broaden the CFAA, and work instead to focus the law in ways similar if not identical to the ones along the lines of the legislation proposed by Representatives Lofgren and Issa. Violating terms of service shouldn't be a crime. Minor intrusions should be treated as minor crimes. The goal must be to punish evil while leaving the rest of us alone.

In 2013, Representative Zoe Lofgren (D-CA), along with Reps. James Sensenbrenner (R-WI), Mike Doyle (D-PA), Yvette Clarke (D-NY) and Jared Polis (D-CO), have introduced H.R. 2454, the *Aaron's Law Act* of 2013. Senator Ron Wyden (D-OR) introduced companion legislation in the Senate. Lofgren and Wyden wrote a piece in *Wired Magazine* entitled, 'Introducing Aaron's Law, a Desperately Needed Reform of the *Computer Fraud and Abuse Act*'. The pair observed that 'the CFAA is a sweeping Internet regulation that criminalizes many forms of common Internet use' which 'allows breathtaking levels of prosecutorial discretion that invites serious abuse'. The pair commented:

The Internet faces broad challenges to the fundamental characteristics that have enabled it to be the transformational technology that we know. An update to the CFAA must be part of the discussion that seeks to resolve these challenges. Today, there's an entire generation of digitally-native young people that have never known a world without an open Internet and their ability to use it as a platform to develop and share ideas. It's up to all of us to keep it that way.

Lofgren and Wyden emphasized: 'We need an informed public debate to ensure lawmakers make the right choices that fully preserve the vital openness of the Internet and the privacy and civil liberties of its users.' The pair noted: 'Reforming the *Computer Fraud and Abuse Act* should be a part of that debate.'

B. Copyright Law Reform

Second, Lessig contended that there was a need to reform copyright laws – such as the *Sonny Bono Copyright Term Extension Act* 1998 (US), and other absurd copyright legislation. He commented:

We have to fix dumb copyright. For we are here in part because of dumb copyright laws. For example, what got me into the copyright activist phase was a statute in honor of this great American, the *Sonny Bono Copyright Term Extension Act* - a statute which extended the term of existing copyrights by 20 years. The question Congress was to ask when they passed this statute was, ‘Did it advance the public good?’ So obvious was it that you couldn’t advance the public good by extending the term of an existing copyright, that when we got a bunch of economists to join a brief attacking the bill in the United States Supreme Court, this liberal left-wing – oh, I’m sorry, this is Milton Friedman – right-wing Nobel-Prize-winning economist said he would join the brief only if the word ‘no brainer’ was somewhere in the brief, so obvious was it that you couldn’t advance the public good by extending the term of existing copyright. But apparently there were no brains in this place when Congress unanimously extended the term of existing copyrights. What there was was more than six million dollars in contributions from Disney and related corporations eager to see their copyright extended, the public good be damned.

C. Open Access

Third, Lessig also emphasized that there was a need to resist legislative efforts, which sought to promote paywall protected gardens of educational and scientific content, and to restrict or restrain open access policies. He is critical efforts in the United States to frustrate the open access movement:

This is a bill called the Research Works Act. The background of this bill is the policy of the National Institute of Health that says that all government-funded research after 12 months has to be available for free download. There are companies that don't like this. [Elsevier logo] They don't like this because despite the Consumer Price Index rising like this [moderate upslope] over the past chunk of time, their serial price has risen like this [much steeper]. They realize they're making an enormous amount of money by selling access to these articles, including articles that have been funded by the taxpayer. So what this bill does, the Research Works Act does, is ban the government from promoting open access for government-funded research. Why? Well, according to the press release when the bill was released, it would save American jobs. Raising the puzzling question, How, when you increase taxes, do you get more jobs? Because effectively we have to pay for the research twice, one when it's produced and one when we finally get access to it.

Lessig concluded that there is 'a need for a copyright law that thinks about copyrights and purpose' and 'in part that purpose is to support a public domain'.

Finally, Lessig observed that there was a need to reform the United States Congress 'to fix the system that makes dumb copyright laws and other laws, environmental laws, healthcare laws possible.' He commented:

Because these dumb laws are law in part because of this thing Aaron identified as corruption. And not just Aaron. As he left the United States Senate, John Kerry gave a speech on the floor where he called it corruption too. He said, 'I mean...the corruption of a system itself that all of us are forced to participate in against our will: The alliance of money and the interests that it represents, ...the agenda that it changes or sets by virtue of its power is steadily silencing the voice of the vast majority of Americans ... who can't compete at all.' This law is to recognize this cause, the cause of this corruption, and the cause is the way we fund our elections. This is the roots, and to take again Thoreau's words, 'If there are a thousand hacking at the branches of evil to one striking at the root,' this is the root that the rootstriker, Aaron, would insist that

we change. And we change to end this corruption. That's number three. Three laws Congress can enact.

Lessig emphasized that Aaron Swartz highlighted the need to recognise and address 'obliviousness to injustice'.

2. Aaron's Army Liberates Bob the Builder

The case of Aaron Swartz is certainly not limited in its significance to the United States. There has been a parallel debate over copyright law and open access in Australia – taking place both in copyright disputes, and policy debates.

A. Aaron's Army

As an elegy for Aaron Swartz, Carl Malamud gave a significant speech, a call-to-arms, called Aaron's Army. He commented: 'Do not think for a moment that Aaron's work on JSTOR was the random act of a lone hacker, some kind of crazy, spur-of-the-moment bulk download.' He observed: 'Sequestering knowledge behind pay walls — making scientific journals only available to a few kids fortunate enough to be at fancy universities and charging \$20 an article for the remaining 99% of us — was a festering wound.' Malamud observed: 'Aaron was part of an army of citizens that believes democracy only works when the citizenry are informed, when we know about our rights—and our obligations'.

B. The Australian Building Codes Board

Aaron's Army has been busy in Australia. On the 30th December 2012, Public Resource posted the Australian National Construction Code, along with other public safety standards incorporated into law by nations around the world.

On the 8th February 2013, the Australian Government responded, with a copyright letter. The Australian Building Codes Board has responded that it was the owner of the copyright in the work, and had not provided permission for the work to be reproduced. The Board warned: ‘If you do not cease and desist from using our work, we may pursue action under the [Copyright] Act.’

On the 10th February 2013, Public Resource responded, declining to remove the National Construction Code. The group emphasized: ‘The law permits us to post the code, and we strongly believe that doing so is in the public interest.’ Public Resource insisted: ‘We did so, as we state as a preamble to each standard we have posted, in order to promote public education and public safety, equal justice for all, a better informed citizenry, the rule of law, world trade and world peace.’ Public Resource commented: ‘We lawfully purchased the National Construction Code, and we have made it available on a noncommercial basis, because it is the right of all people to know and speak the laws that govern them.’

Carl Malamud comments: ‘By making standards available and useful to all, we can make society better’. He observes that ‘Public safety officials can do more to protect citizens’; ‘Researchers can enhance their knowledge of technical fields’ and ‘Small businesses can more easily comply with the law and increase commerce and trade.’

Marcus Priest from the *Australian Financial Review* considered the dispute in a piece entitled ‘Legal threat on “Builder’s Bible’.

‘Government has to pay for itself, but when you charge per viewer to see the laws and (most importantly) prohibit people from speaking the law and making it more understandable, you're claiming as your private property something that really belongs to all of us as a people,’ Carl Malamud told *The Australian Financial Review*. ‘In our modern technical world, public safety laws are some of the most important laws that affect our daily lives.’

A spokesman for the ABCB, defending the threatened legal action, said the code was available free from public libraries and local governments and, importantly, was subject to updates. The spokesman argued: ‘The National Building Code is a nationally important and significant document that is updated yearly.’ He maintained: ‘Because it is updated regularly it is imperative from a safety and compliance perspective that individuals and organisations are accessing the most current version of the code.’ The representative argued: ‘Unauthorised publication of inaccurate or out-of-date versions of the code could result in inadvertent non-compliance and consequent safety risks for the community.’

Master Builders Association acting chief executive Richard Calver commented:

The NCC should be made available online free of charge. But the problematic issue is that the ABCB gets 50 per cent of its funding from the sale of the code and related products. We can't have an organisation of such critical application to our industry under-funded. So the government has to ensure that the funding of the ABCB occurs independently of the sale of those publications.

The dispute questions about whether copyright law should protect standards and laws. The conflict highlights questions about the efficacy of copyright exceptions – particularly the adequacy of the defence of fair dealing. The altercation also raises matters about the role of the Commonwealth Government in making publicly-funded documents, data, and knowledge available in open accessible formats.

Given the controversy over the Aaron Swartz case, it is surprising that the Commonwealth has entered into such a conflict over copyright law and public works.

There is a need to ensure that the Australian Government is consistent in its approach to Open Government. In May 2013, the Attorney-General, Mark Dreyfus, emphasized that the Australian Government had joined the Open Government Partnership. He emphasized: ‘Australia shares the values of the Open Government Partnership and we have a wealth of knowledge and experience to share with other nations in the partnership’. He stressed: ‘We believe that greater openness and accountability in government promotes public participation in government processes and leads to better informed decision-making.’ The Attorney-General emphasized that the Australian Government had sought to improve government transparency through:

- Passing and implementing significant reforms to Freedom of Information, abolishing conclusive certificates and certain application fees, and creating the Office of the Australian Information Commissioner
- Establishing data.gov.au as the Government’s central public dataset repository
- Adopting Government 2.0 principles, providing the public with accessible government information and creating awards to encourage excellence in accessible information

- Creating guidance to make public-sector information accessible, such as the Office of the Australian Information Commissioner Principles on Open Public Sector Information and National Archives guidance on Digital Recordkeeping.

The Attorney-General promised: ‘The Government will start work on a National Action Plan to build on our existing commitments to open and transparent government.’ He maintained: ‘Membership of the Open Government Partnership will complement Australia’s leadership internationally in promoting democracy, transparency and good governance.’ In this context, it is important that Australian Government promote Open Government in terms of copyright litigation and policy.

C. The United States Air Conditioning Standards Dispute

In the United States, there has been a similar conflict involving Public Resource.org. In 2013, the association of Sheet Metal and Air Conditioning Contractors (SMACNA) claimed that the Public Resource.org infringed its copyright through an online post of a federally-mandated 1985 standard on air-duct leakage violated its copyright. In February 2013, the Electronic Frontier Foundation asked a federal judge to ‘protect the free speech rights of an online archive of laws and legal standards after a wrongheaded copyright claim forced the removal of a document detailing important technical standards required by the federal government and several states.’ The Electronic Frontier Foundation emphasized: ‘The standards are a crucial element of U.S. federal energy conservation efforts and an integral part of model codes, such as the International Energy Conservation Code.’

Carl Malamud, the president and founder of Public Resource commented on the case:

The public has a right to meaningful access to the laws that govern their lives. Technical standards like the ones in this document have the force of law, and people need to know them in order to comply with regulatory obligations, keep the public safe, and avoid costly penalties. The right of citizens to read and speak the law is fundamental to an informed citizenry in the United States and throughout the world. Ignorance of the law is no excuse, which means we have to be able to read the law.

The Electronic Frontier Foundation Intellectual Property Director, Corynne McSherry, argued: ‘Building codes and other technical specifications touch our lives every day, and Public Resource is helping to make it easier for us to access and understand how they affect us’. She emphasized: ‘We’re asking the judge today to let Public Resource continue its important work in increasing the public’s access to the laws and regulations that govern us.’

In July 2013, Carl Malamud and Public Resource claimed victory in the dispute. The Electronic Frontier Foundation commented: ‘In a victory for free speech and open government, the Sheet Metal and Air Conditioning Contractors Association (SMACNA) has conceded that it will no longer use trumped up copyright claims to try to stop Public.Resource.Org (Public Resource) from publishing safety standards that have been incorporated into law.’ Electronic Frontier Foundation Intellectual Property Director, Corynne McSherry, commented: ‘Whether it’s the Constitution or a building code, the law is part of the public domain. We’re glad SMACNA is abandoning its effort to undermine that essential principle.’ Carl Malamud commented: ‘It’s about time Standards Development Organizations recognized that if

a technical standard has been incorporated into federal law, the public has a right to read it, speak it and copy it freely. We hope SMACNA has finally learned that lesson.'

3. Aaron Swartz and Australian Law Reform

The dispute raises important issues for consideration in terms of the debate over copyright law reform in Australia.

A. The Australian Parliament

In the Australian Parliament, Senator Scott Ludlam paid tribute to Aaron Swartz: ‘In this tragic case we see an outdated copyright legal regime in the United States that has long ceased being fit for its purpose that is presently criminalising a whole generation of internet users’. He worried: ‘The particular way in which his case was prosecuted when so many others lapse and are left alone tells us something about the state of mind of certain elements of the current US administration and copyright industry overall.’ Ludlam also suggested the case was relevant to policy debates over national security in Australia.

Emphasizing the theme of information-sharing and open access, Ludlam contended: ‘Certainly data, if it is being created by governments at taxpayers' expense, should be in the public domain’. He maintained: ‘That includes things that are routinely denied to senators and members of the general public under our broken freedom of information regime.’

Senator Scott Ludlam commented:

What Aaron understood-and what many other young people understand-is that the internet is the greatest information sharing tool in history. It is potentially peace building, is potentially

solutions generating. In my view, it is leading to the formation of a global civil society and that is extraordinarily valuable. The question, of course, is whether its potential will be realised or whether it will instead be transformed into the greatest surveillance tool ever created, a kind of global electronic panopticon that some elements in our government seem to be quite keen to try and realise.

The case of Aaron Swartz raises important questions about copyright law, and access to education, science, and knowledge. The dispute involving Public Resource and the Commonwealth raises questions about copyright law and its application to laws, standards, and government information.

B. The Australian Law Reform Commission

The Australian Law Reform Commission should contemplate such matters in its inquiry into *Copyright and the Digital Economy*. In its discussion paper, the Australian Law Reform Commission proposed a broad, flexible exception of fair use. The Commission emphasized that the new fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').

The non-exhaustive list of fairness factors should be: '(a) the purpose and character of the use; (b) the nature of the copyright material used; (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used,

considered in relation to the whole of the copyright material; and (d) the effect of the use upon the potential market for, or value of, the copyright material. The non-exhaustive list of illustrative purposes should include the following: (a) research or study; (b) criticism or review; (c) parody or satire; (d) reporting news; (e) non-consumptive; (f) private and domestic; (g) quotation; (h) education; and (i) public administration.

The cases of Aaron Swartz and Carl Malamud certainly highlight the need to focus upon the role of fair use in respect of research and study; criticism and review; education and science; and public administration.

There has been much debate about the scope of fair dealing for research or study. There has been a concern that ‘research’ and ‘study’ have been narrowly construed in Australia. McLachlin CJ of the Supreme Court of Canada in the *CCH* decision emphasized:

The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. ‘Research’ must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that “[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research.” Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

The cases of Aaron Swartz and Carl Malamud highlight the need for a broad conception of research and study. There is a need to ensure that the fair use factors take into account open access policies for educational and scientific materials.

In its Discussion Paper, the Australian Law Reform Commission calls for a reconceptualization of copyright law and education:

Some uses of copyright material by educational institutions are the subject of free-use exceptions in the *Copyright Act 1968* (Cth). Other uses are paid for through licensing arrangements.

Educational institutions should continue to pay for many uses of copyright material, particularly when reasonable and efficient licences are offered by rights holders. An incentive to create is necessary not only for writers, publishers and other rights holders, but also for the students and educational institutions that need educational resources.

However, the ALRC considers that exceptions to copyright are appropriate for some educational uses of copyright, and proposes that the fair use exception should be applied when determining whether an educational use infringes copyright. Further, ‘education’ should be an illustrative purpose in the fair use exception.

If a fair use test is not enacted, the ALRC proposes that a new ‘fair dealing for education’ exception be introduced. This would also require consideration of what is fair, having regard to the same fairness factors in the fair use exception.

In Chapter 6, the ALRC proposes the repeal of the statutory licences in pts VA and VB of the *Copyright Act*. These statutory licences appear to be unsuitable for a digital age. Rights holders, collecting societies and educational institutions should be able to negotiate more flexible and efficient licensing arrangements voluntarily.

In this context, it is worthwhile considering the open access movement in educational institutions, scientific organisations, and public research entities. It is particularly

important that the proposed fair use defence promotes open access to copyright works, which have been funded by Australian taxpayers.

In its Discussion Paper, the Australian Law Reform Commission proposes clarifying copyright exceptions in respect of government uses of copyright material, observing:

Government uses of copyright material are currently the subject of a statutory licence in pt VII div 2 of the *Copyright Act 1968* (Cth). The ALRC proposes the repeal of the statutory licence in Chapter 6, in favour of voluntary licensing. Governments should continue to pay for many uses of copyright material.

However, there are certain uses that are essential for the proper conduct of the administrative, judicial and parliamentary work of government. The fair use exception proposed in Chapter 4 should be applied when determining whether a government use infringes copyright; and ‘public administration’ should be an illustrative purpose in the fair use exception.

This chapter considers some government uses that have caused disagreement and uncertainty under the existing legal arrangements: use required by statute—especially under freedom of information and planning and environment laws—and use where there may be an implied licence—including use of incoming correspondence, material on free websites, and other government material. The ALRC proposes that these uses should be considered under a fair use exception, and anticipates that many of these uses are likely to be fair. However, the fairness factors will ensure that uses that cause unwarranted harm to copyright owners will not be fair use.

The cases of Aaron Swartz and Carl Malamud show a need to reconceptualise fair use and government administration. It is not just a question of government uses of copyright material. A fair use defence covering public administration should include

public use of copyright material held by the Government – particularly given the promotion of open and accessible government.

C. The Trans-Pacific Partnership

The dispute over Aaron Swartz and the Australian controversy over Public Resource has raised larger questions about standards in respect of international trade agreements. The *Australia-United States Free Trade Agreement* 2004 expanded the range of civil and criminal offences in respect of copyright law and other regimes of intellectual property. The proposed *Anti-Counterfeiting Trade Agreement* 2011 – rebuffed by governments around the world – contemplated harsh penalties in respect of copyright piracy, trademark counterfeiting, and border and customs offences.

The *Trans-Pacific Partnership* has been controversial – with the next round of negotiations taking place in Singapore in early March. A leaked draft of the Intellectual Property Chapter has highlighted that an arsenal of intellectual property enforcement mechanisms are under negotiation. There has been much concern about the expansion of intellectual property rights and remedies – and the impact that they will have on access to knowledge, freedom of speech, and rule of law.

The economist and journalist Peter Martin observed: ‘The US is pushing for even more in negotiations under way over the *Trans-Pacific Partnership* trade agreement. We should say no.’

The case of Aaron Swartz should make us reconsider the inclusion of punitive intellectual property measures in both national laws, and international agreements, such as the *Trans-Pacific Partnership*.

Conclusion

In the afterword to Cory Doctorow's book *Homeland*, Aaron Swartz writes:

The system is changing. Thanks to the Internet, everyday people can learn about and organize around an issue even if the system is determined to ignore it. Now, maybe we won't win every time – this is real life, after all – but we finally have a chance. But it only works if you take part... That's right: now it's up to you to change the system. Let me know if I can help.