

November, 2012

A Submission to the Australian Law Reform Commission on Copyright and the Digital Economy: Remix Culture

Matthew Rimmer, *Australian National University College of Law*

A SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

COPYRIGHT AND THE DIGITAL ECONOMY: REMIX CULTURE



‘Kookaburras’, Powerhouse Museum Collection,

http://www.flickr.com/photos/powerhouse_museum/2555451906/lightbox/

DR MATTHEW RIMMER

AUSTRALIAN RESEARCH COUNCIL FUTURE FELLOW

ASSOCIATE PROFESSOR

THE AUSTRALIAN NATIONAL UNIVERSITY

COLLEGE OF LAW

The Australian National University College of Law,

Canberra, ACT, 0200

Work Telephone Number: (02) 61254164

E-Mail Address: Matthew.Rimmer@anu.edu.au

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 draws upon a number of pieces of research on copyright law and remix culture – including:

1. Matthew Rimmer, 'An Elegy for Greg Ham: Copyright Law, the Kookaburra Case, and Remix Culture' (2012) forthcoming.
2. Matthew Rimmer, 'A Fair Use Project for Australia: Copyright Law and Creative Freedom' (2010) 28 (3) *Copyright Reporter* 165-212
3. Matthew Rimmer, 'Fair Use and Other Fantastic Beasts: In Search of Harry Potter' (2009) 21 (9) *Australian Intellectual Property Law Bulletin* 188-192.
4. Matthew Rimmer, 'Harry Potter and the Lexicon of Doom' (2008) 21 (2) *Australian Intellectual Property Law Bulletin* 26-29.
5. Matthew Rimmer, 'The Grey Album: Copyright Law and Digital Sampling' (2005) 114 *Media International Australia* 40-53, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=648323

Such matters are also explored in the book:

Matthew Rimmer, *Digital Copyright and the Consumer Revolution: Hands off my iPod*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, July 2007, http://www.e-elgar.co.uk/bookentry_main.lasso?id=4263

RECOMMENDATIONS

In its issues paper, the Australian Law Reform Commission asks a number of interconnected questions about transformative use, fair dealing, and fair use:

Transformative use

Question 14. How are copyright materials being used in transformative and collaborative ways—for example, in ‘sampling’, ‘remixes’ and ‘mashups’. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

Question 15. Should the use of copyright materials in transformative uses be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

Question 16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

Question 17. Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Fair dealing exceptions

Question 45. The *Copyright Act 1968* (Cth) provides fair dealing exceptions for the purposes of:

- a. research or study;
- b. criticism or review;
- c. parody or satire;
- d. reporting news; and
- e. a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

Question 46. How could the fair dealing exceptions be usefully simplified?

Question 47. Should the *Copyright Act 1968* (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

Other free-use exceptions

Question 48. What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

Question 49. Should any specific exceptions be removed from the *Copyright Act 1968* (Cth)?

Question 50. Should any other specific exceptions be introduced to the *Copyright Act 1968* (Cth)?

Question 51. How can the free-use exceptions in the *Copyright Act 1968* (Cth) be simplified and better structured?

Fair use

Question 52. Should the *Copyright Act 1968* (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on ‘fairness’, ‘reasonableness’ or something else?

Question 53. Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

In response, I would make the following submissions on the topic of copyright law, and transformative use:

Recommendation 1

There is a need to establish a Fair Use Project in Australia to provide institutional support for copyright exceptions in Australia.

The relevant government departments – such as the Attorney General’s Department, the Department of Broadband, Communications, and the Digital Economy, and the Department of Foreign Affairs and Trade – are focused on questions of legislation and policy; and have no

capacity or interest in running test cases in respect of copyright exceptions. The Copyright Tribunal has had a rather narrow role of arbitration. IP Australia is focused upon industrial property. The copyright collecting societies are obviously hostile to copyright exceptions, generally, and have opposed broad readings of copyright exceptions in both the context of policy disputes, and litigation. The Australian Copyright Council and the Arts Law Centre of Australia are very much focused upon the defending the economic and moral rights of artistic creators and copyright owners. The community legal centres in Australia do not possess any particular track record or expertise in respect of copyright litigation, generally, and disputes about copyright exceptions, more particularly, the defence of fair dealing. The Australian Digital Alliance is focused upon the interests of libraries, educational institutions, and technology developers, such as Google. The Creative Commons Australia is primarily focused on the development and up-take of Creative Commons licences, rather than larger questions of copyright litigation and law reform. The Electronic Frontiers Australia has a broader remit than merely copyright law, looking at larger issues of freedom of speech and censorship on the Internet. Well-established university centres, such as the Intellectual Property Research Institute of Australia, the Australian Centre for Intellectual Property in Agriculture, and the Cyberspace Centre for Law and Policy, have a broader remit than copyright law, and lack any accompanying legal clinic.

In the absence of any Fair Use Project, the defence of fair dealing is currently championed by ill-suited defendants in Australia. Large media broadcasters – such as Network Ten Pty Ltd - have been the main ones to raise the defence of fair dealing in litigation. Such entities are clearly poor champions of the defence of fair dealing, because they equally have an interest in protecting the large portfolio of copyright works. The Fair Use Project in the United States has played an important role in providing a strong voice for copyright exceptions – even though the outcomes of the cases that it has been involved in have been variegated.

An Australian Fair Use Project would support advocacy, litigation, policy, and advice with respect to copyright exceptions. Such a Fair Use Project would represent copyright users – including creative artists, fans and amateurs, citizen journalists, scholars and researchers, and others who rely upon copyright exceptions. Such a Fair Use Project should be supported by the Federal Government – much like the Arts Law Centre of Australia and the Australian Copyright Council.

Recommendation 2

Australia's fair dealing exceptions fail to adequately deal with quotations, transformative uses, sampling, remixes, and mash-ups. This is evident in the Kookaburra case.

Recommendation 3

The new defence of fair dealing for parody and satire introduced in 2006 only provides protection for a limited range of cultural works of a particular aesthetic or political character. As seen in the Kookaburra case, certain transformative works fall outside the scope of the defence of fair dealing for parody and satire.

Recommendation 4

The United States defence of fair use affords protection to transformative works. There is some debate about the extent to which this includes sampling, remixes, and mash-ups.

Recommendation 5

Ideally, my first preference would be that the Australian Government should adopt a general defence of fair use, which covers quotations, transformative uses, sampling, remixes, and mash-ups.

Recommendation 6

My second preference would be that the Australian Government should introduce a flexible dealing defence, which covers transformative works, sampling, remixes, and mash-ups.

Recommendation 7

My third preference would be that the Australian Government should introduce a defence of reasonable use for economic rights (much like for the regime of moral rights), which includes transformative works, sampling, remixes, and mash-ups.

Recommendation 8

My fourth preference would be that the Australian Government should introduce a particular defence of fair dealing, which includes transformative works, sampling, remixes, and mash-ups. However, such a defence should apply to both commercial and non-commercial uses, and to both public and private uses.

Recommendation 9

My fifth preference would be that the Australian Government introduce a particular defence of fair dealing that covers quotations, tributes, and homages. I am concerned, though, that such a defence may be too narrow and limited.

Recommendation 10

It is recommended that Australia introduce an exemption in the technological protection measures regime dealing with quotations, transformative works, sampling, remixes and mash-ups.

Recommendation 11

It is doubtful that any proposal for statutory licensing or compulsory licensing of transformative works, remixes or mash-ups in Australia will provide an effective solution.

Recommendation 12

Creative Commons licences – particularly those especially adapted to deal with sampling – may facilitate mash-ups. Nonetheless, certain Creative Commons licences, particularly those with no-derivative works clauses, may be used to discourage the creation and production of mash-ups.

Recommendation 13

It is suggested that, as recommended by Peter Jaszi and Pat Aufderheide in their book *Reclaiming Fair Use*, cultural groups could create professional codes of conduct to help delineate what uses of copyright material are fair within an interpretative community.

Recommendation 14

As part of its underlying objectives, Australia's copyright regime should promote freedom of political communication and artistic expression.