

ADA Conference 2018

Australia's Copyright Reform Process
Professor Jill McKeough

The cup is half full

- * Some positive advances have been made:
- * *Copyright Reform Disability Access and Other Measures Act 2017*

(implements Australia's obligations under the Marrakesh Treaty; removes some outdated technology specific rules)

- *Copyright Amendment Service Providers Bill 2017*
(extends safe harbours, slightly)

Bits and pieces

- * Most copyright reform is ad hoc,
- * focuses on single issues
- * Responds to international obligations
- * May not serve Australian innovation in the best way

BUT: is wholesale reform a good idea?

- * In 1983 the Copyright Law Review Committee was established
- * The CLRC undertook a number of seminal inquiries, including that into Computer Software Protection, Journalists copyright, moral rights, importation provisions of the Copyright Act, performers rights, jurisdiction of the Copyright Tribunal, copyright and contract
- * but none was so bold as the Inquiry into Simplification of the Copyright Act.

CLRC Simplification reference

- * Inquire into and report on how to simplify the Copyright Act to make it comprehensible
- * Particular attention to simplification of exceptions
- * Threshold questions: will copyright law be appropriate in light of technological, commercial and social change in coming decades?

CLRC Report: 20th Anniversary (almost)

- * Two parts to the Report:
- * September 1998 - Exceptions
- * February 1999 – Categorisation of subject matter and exclusive rights
- * 2 classes of subject matter instead of 8 (‘creations’ and ‘productions’)
- * Fair Dealing (!)

Unintended consequences

- * ‘Quite radical departures from the present legislation’
 - * (Ricketson)
- * Wholesale reform of legislation may have unintended consequences
- * The Copyright Act is enormously complex
- * Will always need an informed audience to use it

What happened next?

- * Following CLRC; Hilmer Review; IPCRC (Ergas Review)
- * Then : Harper Review; IT Pricing Inquiry; ALRC; Productivity Commission
- * Online Copyright Infringement amendments
- * Fair Trade Agreements (deal with IP rights)
- * Innovation and Science agenda: ‘leap, connect, sparkle and guide’

‘Stuck in an Infinite Loop’

- * Professor Kathy Bowrey (The Conversation, 18 January 2016)
- * Points out ‘copyright rules and regulations sit behind all the agendas found in the innovation statement’
- * However, major reform is ‘shunted from inquiry to inquiry’

Principles-Based Reform: Standards or Rules?

- * Australian Government Best Practice Regulation Handbook 2010
- * Reform should promote a policy and regulatory framework that is adaptive and efficient
- * Copyright law is so complex, it is already uncertain
- * Industry codes and guides can assist with interpretation

Principles-based reform? or tinkering?

- * Copyright reform does occur, but it tends to be tinkering at the edges (this can still have significant effects).
- * Looking at issues from a broad principles-based perspective is done by reviews, but rarely implemented.
- * EG: Parallel Importing, s. 51(3) CCA; Fair Use

Objections to reform

- * ‘I need my safety blanket’
- * ‘it’s the thin edge of the wedge’
- * Virtue signalling / moral high ground / (let’s harness some mass hysteria)
- * ‘There is no evidence’
- * Transaction costs

The Safety Blanket

- * S 51 (3) Ergas Review; Fair Use
- * Australian judges can't understand....
- * Our constitution does not permit it....
- * It would breach international obligations...
- * Anyway, I like it the way it is....

Thin edge of the wedge

- * The public will take advantage...
- * It will be open slather....
- * They don't understand...
- * Anyway, they are all pirates

Virtue signalling: Mass Hysteria as a tactic

- * Private costs seen as in opposition to public interest
- * Professor Ross Garnaut: 'lobby groups are becoming less inhibited'
- * Proponents 'generally have not desire to engage in meaningful debate about the economics of copyright' (submission 176 to ALRC)
- * 400 form letters from teachers
- * Form letters from authors
- * Articles in newspapers
- * Crying on television (Ergas Review)

‘There is no evidence’

- * Reform recommendations are ‘a theoretical exercise without recognition of commercial realities’
- * There is very little ‘non-commissioned’ research
- * IT Pricing Inquiry found most evidence of commercial harm ‘laughable’
- * Productivity Commission expressed its views on the ‘evidence’ presented as to costs of fair use (in Canada, eg)

Transaction costs

- * Disruption to licensing arrangements in place
- * Renegotiation of contracts
- * Lack of understanding of principles-based standards
- * BUT:
- * Many industry codes already in place (basically have fair use in action)
- * ALRC and PC consider benefits outweigh costs
- * ALRC Report discusses attempts to reduce transaction costs

Next steps

- * Evidence gathering:
- * New Zealand to do an ‘evidence-based review’
- * Academic work being done to gather relevant information / evidence
- * Communication of reality to creators (Rebecca Giblin)