

# *Towards An Innovation Exception? Creating New Rules for an Innovation Society*

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## **I. Introduction**

The Australian *Copyright Act 1968 (Cth)* has become a complicated piece of legislation comprising of several inter-related regulatory schemes. Overall, the Copyright Act now privileges the rights of copyright owners over the needs and interests of the general public. This is the result of both the general neglect of intellectual property and innovation policy by the Howard Government and the politics of convenience that accompanied the Australia-United States Free Trade Agreement (AUSFTA).<sup>2</sup> However, with the election of the Rudd Labor Government in November 2007 a new approach to innovation policy appears possible. What Australia needs is a re-think on copyright policy. It is clear that copyright materials are the currency of the knowledge economy. Without access to copyright materials it is difficult, if not impossible, to successfully pursue socially rewarding activities such as secondary and higher education, research and technology development. This is a crucial point for Australian society. As we move forwards into the 21<sup>st</sup> century we need a society and a workforce that is well-educated, technologically capable and outward looking. But if we lock up knowledge, strengthen the rules against infringement and increase the costs of education and research we will only succeed in achieving the exact opposite of our desired goals. Particularly where innovation is concerned, failing to balance the need for workable rules on liability for secondary infringement against society's need for new technologies, will merely serve to entrench the dominance of existing economic interests. This is profoundly undesirable.

A modern economy needs to be engaged in technology development. For a country like Australia, one that has long ridden on the 'sheep's back,' there needs to be an understanding that relying on natural wealth is not a successful long term option. Economists use the term 'Dutch disease' to explain the phenomenon of nations that are resources rich but economically poor.<sup>3</sup> It is unlikely that Australia will ever lose its status as a first world nation. But if we create a legal system that makes it difficult to develop new technologies and to bring them to market we will cost ourselves economic opportunities, and, quite likely, encourage more home-grown talent to leave our shores. History has shown us that new technologies will disrupt older copyright interests. The photocopy machine, video-cassette recorders, tape recorders, DVD recorders, CD burners and peer to peer technologies have all demonstrated the capacity to enable the

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<sup>2</sup> The AUSFTA resulted in a number of changes to the Copyright Act, the vast bulk of which favoured copyright owners. See further

infringement of copyright.<sup>4</sup> Litigation invariably followed the advent of these technologies.

Arguably, it is in the nature of technological development and progress that older, entrenched interests will be disrupted and even displaced.<sup>5</sup> The question for copyright law is how that process is managed. That is, when should copyright law step in and impose liability, thereby culling a new technology or an innovator and protecting an established interest? This issue has come up in litigation in the United States and in Australia. However, unlike the United States, Australian copyright law does not have a safeguard akin to the Sony safe harbour. In the case of *Sony Corporation v Universal*<sup>6</sup> the US Supreme Court created a rule that provided that where a device or product is capable of substantial non-infringing uses secondary liability for copyright infringement will not be imposed.<sup>7</sup>

What is remarkable is that 25 years after the *Sony* decision, Australian copyright law has nothing within its statute that resembles that rule. Furthermore, after the AUSFTA the Australian Copyright Act took on many aspects of the US Copyright Act.<sup>8</sup> Australia even went further than the United States in its protection of owner's rights. But in this crucial aspect, where innovation is concerned, the two jurisdictions diverge.

In this context if Australia's Copyright Act is examined as a whole a number of truths become self evident. Firstly, the rights of copyright owners to pursue their economic rights are privileged under the Act. Secondly, copyright rights are protected by the state as if they are fundamental properties. Thirdly, the penalties for infringing copyright are quite severe. Fourthly, copyright is expanding outwards from its traditional boundaries to encompass a number of neighbouring rights. To this end, the Act now covers performer's rights and moral rights, both of which are traditionally neighbouring rights. I have also argued previously that one of the rights associated with technology protection measures, namely the access right, amounts to a new neighbouring right.<sup>9</sup>

Fifthly, the exceptions that are in place within the Act exist to further broader public policy goals. Indeed, if the various regulatory schemes are examined within the Copyright Act something becomes quite clear: most of the major public policy goals except innovation have their own schemes. For example, the education sector is accounted for in Part V of the Copyright Act. In particular, Part VB offers a compulsory licensing scheme for educational institutions. There are copying exceptions for the disabled.<sup>10</sup> Part VII of the Copyright Act provides a scheme for Crown copyright so as to

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<sup>4</sup> For example, in *University of New South Wales v Moorhouse* (1975) 133 CLR 1 the use of a photocopy machine for copyright infringement was the subject of litigation

<sup>5</sup> See further Raymond Shih Ray Ku, Consumers and Creative Destruction: Fair Use Beyond Market Failure, 18 *Berkeley Tech. L.J.* 539, 572-73 (2003).

<sup>6</sup> *Sony Corporation v Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>7</sup> This rule is sometimes known as the staple article of commerce doctrine.

<sup>8</sup> Title 17 U.S. Code.

<sup>9</sup> See further Dilan Thampapillai, "The Emergence of An Access Right in Australian Copyright Law," QUT E-Prints. Available at

<sup>10</sup> See Part VA, VB and VC of the Copyright Act.

further the proper functioning of the executive government. Similarly, the fair dealing exceptions in the Copyright Act provide some outlet for free speech by creating exceptions for parody,<sup>11</sup> criticism and review,<sup>12</sup> reporting the news.<sup>13</sup> Education is further protected by the fair dealing exception for research and private study.<sup>14</sup> But what is missing is an exception that supports innovation. By default then, the innovation exception in Australian copyright law becomes the limits of authorisation liability.

The sum total of these truths then is that Australia's copyright regime runs counter to some of the fundamental goals of our society. We have a lock up and lock out regime which has been bequeathed to us by a peculiar confluence of circumstances. If we believe that innovation is central to our long term economic growth then we need to put in place the legal architecture to enable that to happen. In this article I want to make an argument for an innovation exception to be included into the Australian Copyright Act. What I am concerned with is creating the legal space for technology innovators, those who create products that may enable copyright infringement, but which also have legitimate uses, to operate and to avoid liability.

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<sup>11</sup> Section 41A Copyright Act.

<sup>12</sup> Section 41 Copyright Act.

<sup>13</sup> Section 42 Copyright Act.

<sup>14</sup> Section 40 Copyright Act.