

## **Duration of Copyright Protection in Australia**

*Has the appropriate balance been struck?*

*An argument for change to a 'fair use' defence.*

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## Introduction

Rights granted to individuals in the form of copyright protection are said to provide incentive to individuals to create original material and in turn promote creativity and innovation.<sup>1</sup> The trade-off in granting individuals a monopoly over the use of their material is a risk that new works or development of related technologies is restrained to a point at which innovation is negatively impacted.<sup>2</sup>

In the matter of *IceTV Pty Ltd v Nine Network Australia Pty Ltd*<sup>3</sup> the court referred to the underpinning of copyright legislation to one which ‘*strikes a balance of competing interests and competing policy considerations.*’<sup>4</sup> This balance could be disturbed and tipped in favour of authors of copyrighted material in the event of an extension to copyright protection such as an increase in the duration of protection or narrowing of exceptions to infringement.

This paper will present an argument that Australia did not strike the appropriate balance between the competing interests of authors and users when copyright duration was recently extended from 50 years to 70 years whilst maintaining the pre-existing regime for exceptions to copyright infringement. It is contended the duration of copyright protection should not be reduced to that of patents, currently 20 years, but rather a fair use defence to copyright infringement should be adopted to provide the necessary mechanism to promote innovation and new technologies.

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<sup>1</sup> Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013), 59.

<sup>2</sup> *Ibid.*

<sup>3</sup> (2009) 239 CLR 458.

<sup>4</sup> (2009) 239 CLR 458, 471[24] (French CJ, Crennan and Kiefel JJ).

## Critics of Copyright Protection

Copyright is a bundle of exclusive rights granted to an author of original material that can be sold, licensed or otherwise transferred, and is governed by the application of the *Copyright Act 1968* (Cth) ('the Copyright Act').<sup>5</sup> Copyright is said to promote creativity and innovation by offering an incentive to authors to obtain these exclusive rights in order to control the use and dissemination of their work for commercial gain.<sup>6</sup> To balance the rights of copyright owners with that of users, exceptions to copyright infringement are provided for in the Copyright Act to promote social benefits that can arise from the free flow of information.<sup>7</sup>

In recent times, the Australian government has acknowledged the difficulties presented by digital technologies and maintaining the relevance of copyright laws.<sup>8</sup> Tension is increasing between copyright owners seeking enhanced control over access and distribution to maintain commerciality and users now accustomed to using technology free of constraints.<sup>9</sup> Constraints on users may inhibit the ability to build on and develop information to create new works.<sup>10</sup> Further, development of new technologies can be hindered where they are inoperable without use of the copyright material such is the case of computers, consumer electronics and telecommunications.<sup>11</sup>

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<sup>5</sup> Attorney-General's Department (Cth), *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age Issues Paper*, May 2005, 5.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 7.

<sup>10</sup> Ibid.

<sup>11</sup> See, eg, Robertson Wright and Julia Baird, 'Competition and Intellectual Property: The Intersection of Competition and Intellectual Property Law and the 'New Economy' (2008) 16 *Competition and Consumer Law Journal* 143, 149.

There is growing concern about the extension of copyright protection and the subsequent erosion of free access to information.<sup>12</sup> These concerns are reflected in references made in judgments by the courts about copyright balance and subsequent application by the courts of a higher standard to substantiate originality and authorship.<sup>13</sup>

The IceTV decision, whereby the High Court found IceTV did not infringe Nine Network's copyright when it reproduced substantial parts of Nine's weekly program schedules, is an example of the higher standard of originality that is required for protection. Copyright does not protect facts and this aspect is a '*crucial part of the balancing of competing policy considerations in copyright legislation*'.<sup>14</sup> As a whole Nine Network's weekly program schedule was taken to be an original collocation of both information and creative material.<sup>15</sup> The High Court found the form of expression was not one that required particular mental effort or exertion and '*that expression lacks the requisite originality*'.<sup>16</sup>

### **Duration of Copyright**

To meet its obligations under the *Australia-United States Free Trade Agreement* ('AUSFTA'), Australia was required to extend the duration of copyright protection from 50 to 70 years after the death of the author.<sup>17</sup> In the United States this extension had been in place since 1998 when 20 years was added retrospectively to copyright by enactment of the *Sonny Bono Copyright Term Extension Act 1998* (US).<sup>18</sup>

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<sup>12</sup> Wright and Baird above n10, 149.

<sup>13</sup> Ibid.

<sup>14</sup> IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 239 CLR 458, 472 [28] (French CJ, Crennan and Kiefel JJ).

<sup>15</sup> Ibid 477[41].

<sup>16</sup> Ibid 477[42].

<sup>17</sup> *Australia-United States Free Trade Agreement*, signed 18 May 2004 (entered into force 1 January 2005) art. 17.4.4(a) '*on the basis of the life of a natural person, the term shall not be less than the life of the author and 70 years after the author's death*'

<sup>18</sup> Andrew Stewart, Phillip Griffith, Judith Bannister, Adam Liberman, *Intellectual Property in Australia* (LexisNexis 5<sup>th</sup> ed, 2014), 181.

Amendments were made to the *Copyright Act* by the *US Free Trade Agreement Implementation Act 2004* (Cth), which amongst other provisions, amended section 33(2) to extend copyright for a literary, dramatic, musical or artistic work to subsist until the end of 70 years after the end of the calendar year in which the author of the work died. The terms of copyright protection in Europe were harmonised on 1 January 1996 to life of the author plus 70 years from the end of the year in which they died.<sup>19</sup>

The Senate Select Committee charged with examination of the AUSFTA and implementation of the *US Free Trade Agreement Implementation Act 2004* (Cth) heard evidence in support and in opposition to the extension of the copyright term. It was asserted that Australia, as a net importer of intellectual property, would benefit from lower protection whilst larger economies and exporters of intellectual property, such as the United States, Japan and Europe, would likely benefit from stronger protection<sup>20</sup>.

In contrast, government representatives providing evidence to the Committee emphasised the term applied equally to Australian authors, artists and musicians and, whilst Australia is currently a net importer of copyright material, local intelligence holdings are growing which could lead to greater benefits in the future.<sup>21</sup>

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<sup>19</sup> Intellectual Property Office UK, [www.ipo.gov.uk/types/copy/c-duration-faq/c-duration-faq-lasts.htm](http://www.ipo.gov.uk/types/copy/c-duration-faq/c-duration-faq-lasts.htm).

<sup>20</sup> Select Committee on the Free Trade Agreement Between Australia and the United States of America, *Final Report* (2004), 48.

<sup>21</sup> Evidence to Select Committee on the Free Trade Agreement Between Australia and the United States of America, Parliament of Australia, Canberra, 18 May 2004, 104 (Harmer, DFAT).

Industry proponents, such as the Copyright Agency Limited, supported the extension of copyright duration and claimed that Australian creative industries would enjoy greater security to create, produce and distribute its products in knowledge of a good return on their investment and ability to compete with international providers.<sup>22</sup>

The validity of the *Sony Bono Copyright Term Extension Act 1998* (US) was challenged on constitutional grounds and heard by the US Supreme Court in the case of *Eldred v Ashcroft*.<sup>23</sup> The challenge failed and the court upheld the validity of the statute finding it within the power of Congress to set copyright terms as it sees fit. In support of the petitioners to the court, a number of economists stated a 20 year increase in copyright provided an economic return to the author that was so small that the additional incentive to create works was minimal.<sup>24</sup>

In a contrary opinion, Liebowitz and Margolis state that '*small increases in payment need not have small impacts on the creation of additional works*' and explored the possibility that for some authors even a small increase could make a difference to creative output.<sup>25</sup> Further, for the small number of titles that generate the bulk of the economic value, the economic life expectancy of the material is longer.<sup>26</sup> For example, Liebowitz and Margolis found that 68% of all academic titles remained in print for more than 58 years.<sup>27</sup>

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<sup>22</sup> Evidence to Select Committee on the Free Trade Agreement Between Australia and the United States of America, Parliament of Australia, Canberra, 4 May 2004, 33 (Fraser, Copyright Agency Limited).

<sup>23</sup> *Eldred v Ashcroft* 537 US 186 (2003).

<sup>24</sup> Stan Liebowitz and Stephen Margolis, 'Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics and Network Effects' (2005) 18(2) *Harvard Journal of Law & Technology* 435, 438.

<sup>25</sup> *Ibid* 439.

<sup>26</sup> *Ibid* 456.

<sup>27</sup> *Ibid*.

In Australia, the Centre for International Economics attempted to quantify the economic return of an extension to copyright duration to authors to determine the economic impact on users.<sup>28</sup> It concluded the effect is too difficult to quantify due to lack of access to reliable data on the average economic life of copyright.<sup>29</sup> It did find that there is greater evidence in respect to textbook having an economic life that falls well within the current copyright term but again concluded that it was too difficult to quantify the extent of this effect.<sup>30</sup> For example, it was not possible to identify what proportion of existing material would be utilised to produce new works if the copyright term was not extended.<sup>31</sup>

In light of the opposing arguments; the difficulties in accurately capturing Australian data on the economic life of copyright; and the inability to quantify the impact that duration of copyright protection has on the creation of new works or on the development of new technologies, it is useful to look to alternatives that provide a more flexible approach to use of copyrighted material. It is submitted that the focus should be on the permitted uses of copyright material and examine whether this can bring about a realignment of the interests of authors and users rather a focus on a reduction in the duration of copyright protection.

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<sup>28</sup> Centre for International Economics, *Economic analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States*, April 2004.

<sup>29</sup> Ibid 39.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

The information presented with the implementation bill for the AUSFTA recognised the ‘*highly prescriptive requirements for Australian IP law*’<sup>32</sup> and significant costs involved for Australia if no new mechanisms were introduced in legislation to counter-balance these requirements, such as a broad fair use exemption or stronger competition laws.<sup>33</sup>

As stated by McHugh J in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* in respect to construing legislation, legislation that regulates an industry reflects a compromise reached between, or forced upon, powerful and competing groups.<sup>34</sup> It would appear a compromise was not reflected in the Copyright Act when the extension to duration of copyright was adopted without also loosening the closed categories of copyright exceptions.

### **Fair Dealing v Fair Use Exceptions**

The proposal to introduce a defence of fair use has been examined several times in Australia including by the Joint Standing Committee on Treaties in 2004;<sup>35</sup> the Commonwealth Attorney General’s Department in 2005;<sup>36</sup> and more recently by the Australian Law Reform Commission (ALRC) in 2013.<sup>37</sup>

The primary difference between the Australian fair dealing exceptions and the US fair use doctrine is the former is rules based and the later is principles based.

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<sup>32</sup> Department of Parliamentary Services (Cth), *Bills Digest*, No. 21 of 2004-05, 23 June 2004, [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd0405/05bd021](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0405/05bd021)

<sup>33</sup> *Ibid.*

<sup>34</sup> (2005) 224 CLR 193, 231 [126] (McHugh J).

<sup>35</sup> Joint Standing Committee on Treaties, *Australia—United States Free Trade Agreement*, Report 61 (2004), 238.

<sup>36</sup> Attorney-General’s Department (Cth) above n5.

<sup>37</sup> Australian Law Reform Commission above n1.

Division 3 and Division 4 of the Copyright Act set out a series of non-infringing acts with fair dealing applied specifically to the exceptions of research and study; criticism or review; parody or satire; reporting news; and purposes of judicial proceedings or professional advice.<sup>38</sup> One of the difficulties with these exceptions is the lack of a common underlying rationale of fairness.<sup>39</sup>

Sub-section 40(2) of the Copyright Act sets out a list of matters for which regard can be had when determining whether a dealing with a literary, dramatic, musical or artistic work constitutes a fair dealing for the purpose of research or study. The listed factors resemble those that are contained within s.107 of the *Copyright Act 1976 (US)* relating to fair use.

The fair dealing provisions have attracted limited judicial attention with only a few decisions made.<sup>40</sup> In *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd*, Conti J stated fair dealing involves questions of degree and impression and condensed the principles that have emerged from cases that have considered fair dealing defences.<sup>41</sup> Conti J found in favour of Network Ten on the issue of substantiality that is, Network Ten had not substantially copied Nine Network's broadcasts. However, Conti J still proceeded with an assessment of each broadcasted segment to discuss the merits of the fair dealing defences and in some instances he found no fair dealing defence would have been upheld.

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<sup>38</sup> Copyright Act 1968 (Cth) ss 40-43.

<sup>39</sup> Melissa de Zwart, 'Fairness and Balance: Lessons from Canada for the Proposed Australian Law of Fair Use' (2014) 24 *Australian Intellectual Property Journal* 129, 132.

<sup>40</sup> *Ibid*, 134.

<sup>41</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235,[66] (Conti J.).

In particular, where the line between entertainment and criticism is drawn would appear to be a subjective assessment made by the court. For example, Conit J found no purpose of criticism or review in the Wide World of Sports segment with *'the balance falls on this occasion sufficiently clearly in favour of entertainment, albeit not of a satirical but rather of a light hearted and amusing kind'*.<sup>42</sup> As noted by de Zwart, the decision provides little guidance to those attempting to rely on the factors outlined in the case to make a decision about re-use or re-purposing of copyright material.<sup>43</sup>

Supporters of the fair dealing exceptions often refer to the rules based approach as providing certainty.<sup>44</sup> However, as seen in the TCN Channel Nine decision, drawing guidance and precedent from the Australian cases that have examined fair dealing can be problematic.

Instead it is submitted that the fair use doctrine provides certainty in terms of application of a consistent set of principles and also provides for flexibility and 'futureproofing' to enable regulation to respond to new technologies and uses as they arise.<sup>45</sup> One of the concerns of stakeholders noted by the ALRC, was the lengthy delay in consideration of new uses and new copyright exceptions.<sup>46</sup> For example, time shifting was found to be fair use and permitted in the US in 1984,<sup>47</sup> yet it took Australia 22 years to catch up with amendments to the legislation to permit format shifting and time shifting, which were not made until 2006.<sup>48</sup>

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<sup>42</sup>TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2001) 108 FCR 235, [72] (Conti J).

<sup>43</sup> de Zwart above n39, 134.

<sup>44</sup>Australian Law Reform Commission above n1, 81.

<sup>45</sup> Ibid 100.

<sup>46</sup> Ibid 96.

<sup>47</sup> Sony Corp of America v Universal City Studios Inc 464 US 417 (1984).

<sup>48</sup> Copyright Amendment Act 2006 (Cth).

The concept of fair use was founded in the case of *Folsom v Marsh*,<sup>49</sup> which established a four step test for identifying fair use. This approach was codified in s.107 of the *Copyright Act 1976* (US). In making a determination that use is an infringement the following steps require consideration: purpose and character of use; nature of the copyright work; amount and substantiality of the portion used in relation to the copyrighted work as a whole; and effect of the use upon the potential market for or value of the copyrighted work. The transformative and/or creative natures of the use are also considered.

Fair use has been pivotal in permitting new innovations, such as home recordings of television programs, to flourish. As noted above, in the case of *Sony Corporation v Universal City Studios*<sup>50</sup> time shifting was found to be a permitted use under the fair use doctrine. The case involved the entertainment industry suing Sony for distribution of Betamax VCRs that enabled viewers to copy television programs onto tape. The US Supreme Court found private, non-commercial time shifting of television programs was fair use within the principles set out in s.107 of the *Copyright Act 1976* (US).

In a more recent case, *Authors Guild Inc v Google Inc.*,<sup>51</sup> the US District Court in New York held that Google's scanning of copyrighted books for indexing purposes fell within fair use and dismissed the case. The matter involved a library digitisation process, which involved the scanning of books and making the full text available for searching on Google's website without seeking copyright owners' permission.<sup>52</sup>

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<sup>49</sup> 9F Cas. 342 (Mass. C.C.D. 1841).

<sup>50</sup> 464 US 417 (1984).

<sup>51</sup> *Authors Guild Inc et al v Google Inc* 05-08136 (SD NY 2013).

<sup>52</sup> Emily Proskine, 'Google's Technicolor Dreamcoat: A Copyright Analysis of The Google Book Search Library Project' (2006) 21 *Berkeley Technology Law Journal* 213, 216.

Over the course of 5 years the Google Book Project aims to scan and digitise over 15 million books including a digitilisation of every work in the library collection of five participating library collections (Stanford, University of Michigan, Harvard University, Oxford University and the New York Public Library).<sup>53</sup> In response to a user search Google's search engine will return a list of books that include the term and, if copyrighted, the user will receive snippets of the text; a count of the search term; a link to online booksellers and the nearest library that houses the book.<sup>54</sup>

Google did not seek permission of copyright owners given logistics and costs that would have been involved in obtaining such permissions and the issue of orphan works where authors can not easily be found.<sup>55</sup> Instead, Google operates on an opt-out basis that is, if the author does not want their work included in the database they can contact Google to opt-out of the project.<sup>56</sup>

The public benefits gained out the Google Book Project are numerous including: the expansion of access to books particularly to those who are print-disabled such as the sight impaired; efficiency for readers and researchers to locate books; preservation of old and out of print books; and increased sales of authors and publishers.<sup>57</sup> It is doubtful that such benefits could be derived in Australia under its current fair dealing exception for research and study. Accordingly, Google would be limited in establishing such an extensive database in Australia.<sup>58</sup>

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<sup>53</sup> Proskine above n52, 217.

<sup>54</sup> Ibid 218.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid 219.

<sup>57</sup> Australian Law Reform Commission above n1,101.

<sup>58</sup> Ibid 102.

Critics of the fair use doctrine refer to differing determinations on cases that have been made by the lower courts in the US, later overturned in courts of appeal and reversed by the US Supreme Court.<sup>59</sup> Defending a fair use claim can, therefore, be expensive for defendants.<sup>60</sup> It is also argued that fair use may not be adopted in the same way in Australia as it has been in America with judicial interpretation being required on a case by case basis to interpret the scope of the law and difficulties in implementation due to licensing and business arrangements.<sup>61</sup>

Critics also argue that fair dealing could include the notion of balance and this aspect needs due recognition as evidenced in the interpretation of copyright law in Canada.<sup>62</sup> The Canadian Supreme Court has shown there is significant flexibility already embedded within the concept of fair dealing which could be equally applied in Australia to expand the application of fair dealing provisions.<sup>63</sup>

On balance, it is submitted that the arguments put forward for adoption of the fair use doctrine by the ALRC are stronger than those in opposition. The fair use doctrine's responsiveness to new technologies such as the Betamax VCRs and the Google Book Project have reaped significant benefits to the public which can not be matched by the more prescriptive fair dealing exceptions. These types of innovations are stifled until specific legislation is introduced to address new categories worthy of exception. The time lag associated with the introduction of this type of legislation and lack of political will is demonstrated in the example of the 22 year time period that it took for time shifting to be permitted in Australia.

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<sup>59</sup> Attorney General's Department (Cth) above n5, 21.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid 32.

<sup>62</sup> de Zwart above n39, 136.

<sup>63</sup> Ibid 144.

The fair use doctrine demonstrates there is scope to use copyright material in an innovative way in the public interest whilst still respecting the interests and rights of authors, as seen in the Google Book Project where competing interests were balanced.

### **Conclusion**

Reducing the duration of copyright protection down from 70 years to 50 years or a lesser duration such as that which applies to patents would be incredibly difficult in light of the AUSFTA and laws of other trading partners.

As noted, there is evidence to suggest that duration of copyright could have the potential to offer a small incentive for the creation of works and its effect on reducing innovation could be overstated. Moreover, there is no accurate means of quantifying the resulting reduction in innovation from the extended duration of copyright protection that was granted.

A more prudent approach is to consider alternatives to balance the competing interests of authors and users and it is put forward that an appropriate mechanism that could be adopted in Australia is a principles based approach to fairness. It is submitted that adoption of the fair use doctrine in Australian law would import the necessary flexibility required for new technologies and copyright reliant industries without causing significant damage to the rights of copyright owners or requiring reduction of the duration of copyright protection that has been granted to them.

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