



UNIVERSITY OF
TORONTO
FACULTY OF LAW

ARIEL KATZ
ASSOCIATE PROFESSOR
INNOVATION CHAIR, ELECTRONIC COMMERCE

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The Australian Government Productivity Commission

Dear Sirs or Madams,

Re: Intellectual Property Arrangements

I have followed with interest the debates in Australia about the merit of an open-ended fair use exception to copyright and I fully support the Productivity Commission recommendation in that regard.

Having written and taught about fair dealing and fair use in Canada, I thought I this brief submission might be of interest to you:

1. Fair Use vs. Fair Dealing:

I am attaching a copy of a book chapter that I wrote a few years ago, entitled “Fair Use 2.0: The Rebirth of Fair Dealing in Canada”.

This Chapter recounts the history of fair use and fair dealing. It traces the shared common law origins of fair use and fair dealing in English and American copyright law and shows that the enactment of the 1911 UK Copyright Act - the basis for current copyright laws of most Commonwealth jurisdictions - was not designed to cause any major alteration in the common law of fair dealing. The historical record shows that the distinction between US-style open-ended fair use and fair dealing as a myth: the codification of fair dealing in 1911 was not designed to limit its application to the enumerated purposes included in the statute. Likewise, there is no evidence supporting the view that the term “fair dealing” connotes a different meaning from “fair use” (indeed, the French version of the Canadian Copyright Act, which is equally authoritative as the English version, uses the term “l’utilisation equitable”).

The Chapter concludes not only embracing an open-ended fair use/dealing exception would be beneficial, but also contrary to some views, adopting an open-ended exception will not transplant a foreign legal concept. Rather, it will reunite present copyright doctrine with its rich and historic roots that were latent but never discarded.

2. No Basis for Horror Stories about Canada

I am aware that opponents of the proposed reform have referred to the supposedly devastating impact that recent developments in Canada's copyright law have inflicted on Canadian publishers.

Those "horror" stories first appeared in an article in the Quill & Quire two years ago, and subsequently they were incorporated in a PWC report that Access Copyright had commissioned. I responded to the Quill & Quire story in a series of three blog posts, which I hope might be useful for you. You can find these blog posts in the following links:

<http://arielkatz.org/archives/3281>

<http://arielkatz.org/archives/3327>

<http://arielkatz.org/archives/3375>

3. Orphan Works

I am also attaching my 2012 article on the problem of orphan works, which I hope you find useful in formulating your final report.

This article proposes a modest common law solution to the orphan works problem: works that are still under copyright but whose owners cannot be easily located. Most discussions on the orphan works problem focus on the demand side: on users' inability to locate owners. However, looking also at the supply side reveals that the problem of orphan works arises not only because users find it prohibitively costly to locate owners, but also because under a strict permission-first rule copyright owners, who do not internalize the full social cost of forgone uses, face suboptimal incentives to maintain themselves locatable. However, in many cases copyright owners are usually the least-cost avoiders of the orphan works problem, and like in many other areas of law, should be encouraged to take steps to reduce the extent of the problem. Building on this insight, the article shows how considering the locatability of the owner of an infringed work at the remedy stage and tweaking the appropriate remedy will encourage owners to remain locatable, and why this solution is preferable to other proposed solutions. The article also discusses the tendency to treat the requirement to seek permission before using as a dogma, and why this dogmatic view of copyright impedes simple and efficient solutions and leads to the adoption of grand solutions that are ineffective at best and harmful at worst.

Yours truly,

Ariel Katz