

# **Fair Enough?**

## **Copyright and the Australia-United States Free Trade Agreement**

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### **Abstract**

The FTA Implementation Bill proposes that Australia's copyright regime be harmonised with that of the USA. In particular, mooted changes include the length of copyright protection terms, the criminalisation of currently legal uses of intellectual property and a more authoritarian approach to the use of circumvention devices. These all serve to make Australia's copyright laws more restrictive. In the US, fair use provisions which allow copyright breaches to be 'defended' on a case-by-base basis balance this greater restriction. However, the FTA Implementation Bill does not expand Australia's minimal fair-dealing laws, despite submissions to that end. In its 'selective harmonisation', the FTA appears to favour copyright owners over users, and shifts the balance of Australia's existing copyright scheme. This paper outlines the changes in Australian copyright law that will occur with the implementation of FTA, and argues that equity between owners of copyright and its users has been disrupted - more restrictive copyright rules should be balanced by the adoption of doctrines of fair use.

### **Introduction**

For one-hundred-fifty years the Stationers' Company, a London-based collection of booksellers, enforced an oppressive, censorial regime of Crown control over literary works. By virtue of a Royal Charter, the Stationers' Company were granted the power to regulate the availability of books. Copyright emerged in the early 1700s to break the monopoly exercised by those booksellers.

Monopolies were considered injurious to society, so the world's first copyright legislation (Statute of Anne, 1710) was devised to balance the competing interests of authors and the wider desires of society. The law secured literary property to authors in order to provide an incentive to create works that would inform and advance society - hence the statute's title, 'An Act For The Encouragement of Learning'. This motivation was reinforced by Lord Camden's rhetorical question asked during the landmark case of *Donaldson v. Becket* [1774]: "[w]hy did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species."<sup>1</sup> In the intervening centuries, copyright was massaged by various interests, shaped by technological change and extended in

both scope and duration. Despite an increase in the rights afforded to copyholders, the public has consistently been reiterated as the primary beneficiary of copyright's grant of limited monopoly, with the economic interests of the author a secondary consideration.

Historically, the nature of the marketplace has required creators to assign their copyrights to publishers, recording labels or employers in order to benefit from the opportunity for wider dissemination. As more and more intellectual property rights have come to be held by large multinational corporations, governments have been under increasing pressure to protect those rights. The lobbying power of such corporations should not be underestimated. In the US, the movie and music industries are leading the fight against copyright infringement, and have persuaded Congress to entertain draconian proposals such as the 'Induce Act', which is designed to "hold technology companies liable if they manufacture products that could encourage people to infringe copyright" (Dean, 2004). Such a broad-brush approach to copyright enforcement could criminalise the manufacture of such apparently innocuous devices as photocopiers, iPods or floppy disks. Despite this, it has still managed to attract the support of many members of the US Congress.

As well, the digitisation of copyright materials has introduced new dimensions to the copyright debate, and altered the balance of rights between intellectual property owners and users. Whereas the difficulty of copying materials has traditionally provided a measure of protection for copyright owners, digital technologies have not only made it easy to duplicate material, but they have also allowed this duplication to occur without degradation. Moreover, the Internet has allowed unprecedented global access to replicated material. Governments have responded on behalf of copyright owners by altering copyright laws for the digital age. For example, the American *Digital Millennium Copyright Act 1998* (hereafter DMCA) and the Australian *Copyright Amendment (Digital Agenda) Act 2000* (hereafter Digital Agenda) represented co-ordinated responses to the apparent challenges to copyright that digitisation allowed. Further, digitisation has raised public awareness of the implications of stringent over-protection of intellectual property rights, and shifted perceptions away from copyright law as a dry and boring subject. Napster, for example, single-handedly raised awareness of the implications of copyright for the individual user, and the case of *Eldred v. Ashcroft* [2002] drew flocks of interested spectators to the US Supreme Court. Presently, thousands of file-sharers risk the wrath of the RIAA. Copyright has become a public concern over contested activities.

At the same time, the global push for unencumbered trade flows resulted in a trend towards the homogenisation, or the so-called *harmonisation*, of copyright laws. In a policy area that has traditionally been a tightly held national responsibility, governments are being encouraged to minimise the differences between their copyright regimes. For example, local rights and parallel importation rules form the basis of industries, such as book and music publishing, and have been the subject of much recent policy debate - the public crux of which appears to be the price of books or CDs.

The Australia-US Free Trade Agreement (hereafter FTA) is a case in point. Of course, this paper is not concerned with the FTA as a whole - complete analysis of the FTA properly demands more analysis than can be provided here. Our focus is on the copyright provisions of the agreement. Thus, rather than deal with the breadth of intellectual property debates, such as those raised by the World Trade Organisation's TRIPS (Trade-Related Aspects of Intellectual Property Right) Agreement, this paper concentrates on the Australian citizen's engagement with media productions in the culture industries.

The FTA is designed to allow harmonisation of Australia's copyright regime with that of the USA. Although Australia's Digital Agenda is comparable to the DMCA, much of domestic law pertaining to copyright will be amended upon implementation of the FTA. However, harmonisation is a troubling term when applied to the FTA. This paper argues that,

as currently proposed, the agreement practices a form of *selective harmonisation*. Although Australia will adopt many aspects of US copyright law, the current proposals make no mention of introducing an Australian fair use defence. The amendments to domestic copyright law that will occur as a result of the FTA will criminalise common behaviours. It will introduce new criminal offences, expanding the scope of copyright infringement without the due recourse to an adequate defence in instances of everyday use that may violate the new rights afforded to intellectual property owners.

There are three areas of concern in the FTA implementation with possible ramifications for individual engagement with intellectual property. The first area deals with the length of copyright protection, and extends the current Australian term of copyright from fifty years to seventy years from the death of the author. Whilst this amendment has raised concerns over potential increases in the price of books, and will further delay entry into the public domain, it represents the lesser of the evils proposed for implementation. Thus the extension to the term of copyright protection will not be considered in any detail here, but it does form part of a triumvirate of changes which, when considered as a whole, will significantly shift the balance of copyright.

The second area of legal change involves the criminal penalties involved in copyright infringement. Copyright infringement currently involves criminal sanctions if it involves commercial dealings (ACC, 2003), and the law is generally concerned with preventing mass unauthorised distribution of copyrighted materials. In addition, the Digital Agenda criminalises the manufacture and distribution of devices to circumvent technological protection measures (which will be discussed later in this paper). The FTA, however, compels Australia to criminalise copyright infringements that may not involve financial gain. Varghese (2004) writes that Article 17.11.26(a) requires Australia to impose criminal sanctions for

wilful copyright piracy on a commercial scale' that are to include significant wilful infringements of copyright that have no direct or indirect motivation of financial gain; wilful infringements for the purposes of commercial advantage or financial gain. (p. 22)

At issue is the contentious and untested scale of activity required for prosecution. Whilst current domestic law does not criminalise the possession of infringing copyrighted material, the amendments proposed under the *FTA Implementation Bill* have the potential to entrap a range of previously non-commercial, non-infringing activity, which begs the question of whether the new amendments really have anything to do with copyright at all. For example, it is common for travellers to South East Asia to return with a collection of two-dollar DVDs of newly released movies. The amended law may make the importation of such movies - even for personal use - a criminal activity. Previously, such *possession* of infringing material was not sufficient to warrant criminal sanctions. Rather, such criminalisation required the intent to gain financially from commercial distribution of infringing copies (p. 22).

Although any in-depth analysis of the debate surrounding digital copyright legislation is beyond the scope of this paper, it is worth noting that some commentators argue that such laws are draconian and share more in common with the censorial Licensing Acts of seventeenth century England (Patterson, 2002; MacMillan, 2002). It is important to note that the definition of piracy in relation to copyright infringement differs greatly depending on the point of view taken. For example, most individuals would not apply the term to using digital images taken from the television show *Millennium* on a private fan website. As owners of the series, Fox took the opposing view and issued a cease and desist notice, and threatened the University of Texas at El Paso with legal action for hosting the website (Silberman).

As well, some American criminal sanctions appear inconsistent. Lessig (2004) states that California state law, for example, provides a maximum \$1,000 fine for the act of stealing a CD from a shop. Downloading the same content from a peer-to-peer file-sharing network may attract a \$150,000 fine *per instance* of infringement (p. 180). Thus downloading *Robbie Williams: Greatest Hits* could potentially incur a penalty of up to \$2,850,000 in statutory damages for wilful infringement through the acquisition of nineteen MP3s at half CD quality *sans* artwork and case. Naturally, it is extremely unlikely that a file-sharing individual indicted by the RIAA possesses the means to accommodate such a fine. The RIAA, however, are persistent: Jesse Jordan was prosecuted by the RIAA, seeking \$15,000,000 in damages. The case was eventually settled for \$12,000, not the amount sought, but the sum of Jordan's life savings (p. 51).

Ironically, 'misdeeds' such as smuggling pirated versions of Hollywood DVDs are street-level responses to restrictive trading arrangements imposed on the marketplace by multinational oligopolies. They occur because of the regional playback control technology (hereafter RPC technology) regime that effectively divides the world into six regional zones. Each zone receives movies at different and managed times. DVD players are available for sale in each zone, but many are typically configured to only play DVDs issued to that zone. Users utilising informational websites such as *Videohelp.com* can adjust the configuration of regional playback control for many DVD players.<sup>2</sup> As well as potentially criminalising the ownership of particular DVD material, the legality of 'hacking' the RPC technology in legally owned DVD players and software will be contested under the FTA Implementation Bill. The result is the severe restriction on DVD titles that individuals may watch.

Arguably, this type of technological protection is designed to allow copyright owners the ability to control access to content, and to overcome the global trend towards opening up markets. For example, one of the principles of Free Trade Agreements generally is to allow greater access to goods and services. To this end, the FTA specifically bans government prohibition of so-called parallel importation, which is often used to protect local industries. With RPC technology and amendments to copyright law, copyright owners have effectively reconstituted their protection and made parallel importation illegal again. Even more importantly, Article 17.4.7(b) has the potential to entrench - indeed, legally protect - anti-competitive and market segmentation practices of copyright owners, and undermine Australia's policies in favour of competition in the supply of legitimate copyright works, as implemented through Australia's parallel importation laws, to the detriment of Australian consumers (Weatherall, 2004).

The third area of change involves technological protection measures (hereafter TPMs). In the digital realm, copyright holders are increasingly turning to technology to prevent illicit uses of material. For example, there are media forms with copy protection built in, which require particular devices to play their music or movies. It is difficult to raise objections to copyright owners wanting to protect both their property and market from piracy, but TPMs are having an over-reaching impact on other non-infringing uses. The FTA criminalises the use of measures that over-ride those protections. Currently, domestic law does not make it illegal to possess or use such 'circumvention devices', but does make it illegal to manufacture or distribute them, regardless of whether or not profit is to be gained.

It should be noted that circumvention devices are not the sole domain of pointy-eared geeks hacking hardware and software to play pirated videogames. The aforementioned RPC technology is a particular configuration of a TPM. Many individuals own DVD players that have been modified to play DVDs from any region. They are making use of websites such as *Videohelp.com* to play movies received at Christmas or birthdays from friends overseas. Moreover, it is not unusual for major electronic retailers to offer so-called 'chipped' region-free DVD players to their customers, unaware that such a modification may be construed as a

TPM circumvention device. It is precisely this arena of activity that is due to become illegal should the *FTA Implementation Bill* be passed in its current state.

The FTA's provision to impose criminal penalties for use of circumvention devices is an unnecessary manoeuvre in the assault on piracy. Domestic law, under the Digital Agenda currently makes it difficult to obtain circumvention devices in Australia. The decision in *Sony v. Stevens* [2002] (discussed below) has expanded the definition of TPM beyond that set in the statute entrapping a wider range of technologies and activities. Arguably, prohibiting the manufacture and distribution of circumvention devices within Australia ought to be sufficient for copyright owners to protect their property against piracy. There is no reason to impose criminal sanctions on individual end-users. The law presently provides copyright owners with a sufficient avenue to seek redress against manufacturers, distributors and importers of circumvention devices. In the past, potentially infringing technologies have been accommodated by the creativity industries. For example, blank cassette tapes have been subject to levies. Digital Audio Tape machines are hardwired to generate signal degradation on successive copies. Such remedies suggest that there are other options to be explored, but ostensibly this is not a war on copyright, but a battle for control of distribution. New technologies quickly establish new markets, commercial and/or *gratis* economies. Once a market is established, the corporate players rapidly descend to enforce monopolisation. On the current legal battle surrounding file-sharing activities, Lessig writes that "this is a war on file-sharing technologies, not a war on copyright infringement" (p. 74). Only once *millions* of users demonstrated the existence of a market, albeit *gratis*, for downloadable music did the RIAA take an interest. Similarly, only when musical sampling became a marketable commodity through the rap and hip-hop genres did record companies begin litigation for copyright infringement.

The end result is that the FTA will result in significantly more stringent copyright law for Australia. These laws will shift the balance inherent in copyright further toward the American model of copyright protection - one that favours copyright owners over ordinary end-users. Whilst Australia's copyright regime has been revised so as to accommodate new technologies, as far as copyright owners are concerned, there has been little development in ensuring freedom for activities that, whilst under current law may infringe copyrights, certainly do not amount to piracy.

Since 1740 the law has recognised exceptions to copyright that permit copying under certain circumstances.<sup>3</sup> Australia, like other common law countries such as Great Britain and Canada, provides statutory exceptions to claims of copyright infringement by virtue of a fair dealing defence. The provisions for fair dealing are extremely precise and apply only in situations where the use is for research or study, criticism or review, or for reporting news. Although the Copyright Law Review Committee's comparative study of defences to claims of copyright infringement (2004) indicates that Australia's provisions are broader than counterparts found in the domestic law of England, New Zealand, France, Germany, Canada, Denmark and Finland, the provisions offer no flexibility in adapting to the challenges presented by new technologies. Under current domestic law, 'ripping' a CD to MP3 format for playback on a portable digital music player or computer amounts to copyright infringement. This is because the process of 'format-shifting' infringes the copyholder's exclusive reproduction right. To clarify the situation, this means that individuals can be potentially liable for 'ripping' a *purchased* CD in order to listen to it on an iPod. Thus, in Australia, the absence (to date) of Apple's iTunes Music Store means that there is no legal use for an iPod in its primary function as a music player.<sup>4</sup> Australia's fair dealing provisions, so precise in their applicability, offer no defence.

In contrast, the US fair use doctrine is more flexible. Section 107 of the Copyright Act 1976 sets out four enumerated factors that are to be considered by a court determining a

fair use defence. The factors require a court to assess items such as the use of the material, whether use is for a commercial or non-commercial purpose, and then the extent, if any, of economic harm to the market for the original. Further, the language of the statute grants judges the discretion to consider other factors appropriate to the case at hand. For example, Samuels notes that, although not explicitly mentioned in the Act, there is a well-established tradition of protecting parodies as fair use, even if that parody adversely affects the market for the original work (Kaplan, 1967; Samuels, 2000). Unlike Australia's fair dealing provisions, the scope of fair use is not finite. This promotes flexibility in meeting the challenges presented in an era of rapid technological development. Fair dealing, on the other hand, is ill-equipped to cope with such challenges. Current proposals for the domestic implementation of the FTA contain no mention of adopting the fair use doctrine.

Thus the harmonisation of the copyright regimes of Australia and the US is incomplete and represents *selective* harmonisation. Under the agreement, Australia faces harsher copyright laws for the benefit of copyright owners, yet fails to provide any benefits for users - the primary beneficiaries of copyright under Anglo-American jurisprudence. Proposals for an Australian fair use defence have been advanced and consistently ignored. In 1995, the Labour government reconstituted the Copyright Law Review Committee to investigate a reformation of the nation's copyright laws. The CLRC recommended the controversial proposal that fair dealing be amended to mirror the fair use doctrine. The proposal was never adopted. In the first review of the Digital Agenda, organised by Phillips Fox in August 2003, discussion of expanding fair dealing was declared off-limits, to the dismay of many attendees. This was because Philips Fox (the law firm charged with conducting the review) considered the topic to be outside the terms of reference set for the review. More recently, the Senate Select Committee on the FTA recognised that US law favours copyright holders, and proposed that Australia requires adoption of the fair use doctrine in order to maintain the necessary balance between the public interest principle and owners' rights within copyright.

As stated above, to date there is no mention of adopting fair use in the *FTA Implementation Bill* and proposals for adoption have been met with opposition, even righteous indignation, from copyright holders. In August, via an online media statement, APRA (2004) announced its objections to an Australian fair use defence, stating that "copyright protection for owners has been substantially weakened by the digitisation of copyright materials and the increasing ability of users to reproduce and make them available on networks without authorisation." This media statement implies that APRA believes that users should be penalised because of the endemic rise in file-sharing. For the Australian government to accede to such counter-arguments to an Australian fair use defence is to ignore other wider benefits of fair use that will provide a defence for everyday activities that have no adverse effect upon the market for copyrighted works, yet they will be outlawed under the FTA. As Charles Oppenheim (1999) notes,

[t]here is little point in the law being strengthened if all that results is greater violation of, and contempt for, the law than at present. A law that is regarded as unfair, is widely flouted and that cannot be policed effectively is probably not worth being on the statute book, as the developers of the [English] Poll Tax discovered. (p. 139)

At this juncture, it should be noted that the fair use doctrine is no guarantee of freedom, and has itself suffered under the US response to digital technologies. The new breed of digital rights legislation, such as the highly critiqued *Digital Millennium Copyright Act 1998* and Australia's own Digital Agenda, has moved the focus of copyright protection away

from piracy, and toward regulation of access control and the use of technological protection measures. Under the new digital regime in America, fair use exceptions are murkier.

Fair use rights are much more apparent in the analogue realm. For example, the Supreme Court in the *Betamax* case between Sony and Universal Studios<sup>5</sup> enshrined the videoing of material for personal use as a fair use, allowing end-users the freedom to tape *The Simpsons* for delayed viewing without fear of prosecution. The Supreme Court found that such ‘time-shifting’ was an ordinary, proper activity among the public and is protected under the fair use doctrine. By contrast, although never tested in court, ‘time-shifting’ is an infringement of Australian copyright law. This, and many other activities, remain unprotected by the inflexible fair dealing provisions that are incapable of accommodating the challenges raised by new media technologies. Professor Lloyd Weinreb (1990) argues that the court in the *Betamax* case could not have reached its decision through consideration of the enumerated fair use factors alone (p. 1137). Weinreb advances the notion that, in addition to the four factors, courts ought to consider “other social values, or more simply fairness” (p. 1150). The notion of fairness need not be legally ambiguous, but may be determined by analysis of a community’s approval or disapproval for a particular practice. In an age of diverse and rapid technological change, a community’s normative standards may challenge the exclusivity of a copyright owner’s right to exploit a work.

Whereas fair use rights are clearer when digital technologies do not form a complicating factor, the wording of the *Digital Millennium Copyright Act 1998* contains rhetoric which includes fair use provisions, whilst simultaneously making illegal any practical way for users to make use of those fair use rights. Section 1201 contains a clause which states that “[n]othing in section 1201 shall affect rights, remedies, limitations, or defences to copyright infringement, including fair use, under this title.” This clause, however, is effectively meaningless when users are barred from accessing the copyrighted material by a technological protection measure. Although circumvention of a TPM does not weigh against a fair use defence raised for usage of the copyright material, many users lack the knowledge and incentive to risk the criminal sanctions implicated once a TPM has been breached. The Digital Agenda, by contrast, contains no comparable ‘saving clause’ and, furthermore, makes no mention of fair dealing within the section concerning circumvention devices. Thus there is no statutory provision for fair dealing of material protected by TPMs.

Historically, copyright was concerned with protecting against piracy in order to maintain the incentive to create provided by the grant of a limited monopoly. Consecutive expansions to rights, such as the introduction of the right to prepare derivative works and extended protection terms, have afforded copyright owners with a greater monopoly, whilst the right to technologically protect copyrighted materials affords owners with an additional layer of protection. The new digital protections criminalise any attempt to exercise a fair use of copyrighted works or products, despite the overt lack of any market harm. For example, Sony’s Aibopet - an electronic dog - can be ‘hacked’ to teach the dog to dance. In order to teach the dog, however, Sony’s technological protection measure must be circumvented. After sharing the information on how to circumvent the Aibopet’s protection system and teach it to dance jazz, the Webmaster of *Aibopet.com* received a cease and desist notice, from lawyers representing Sony, for contravention of the DMCA’s anti-circumvention provisions. The Aibopet represents just one instance of copyright owners hostility towards individuals attempting to exercise fair use of copyrighted materials or products.

This paper is not advocating a defence that gives *carte blanche* to pirate copyrighted works and fully supports the notion that owners should be able to legally protect their property. Extensive over-protection, however, has wider impacts upon individuals’ ordinary, everyday activities. As previously mentioned, Australia’s current digital copyright regime prohibits the manufacture and sale of devices and software designed to circumvent TPMs, but

not the use of such technologies. This will change following the implementation of the FTA which, under Article 17.4.7, obligates Australia to provide additional criminal and civil sanctions against those who circumvent TPMs. This amendment to domestic law will essentially render criminal every owner of a modified PS2 or X-Box. Criminal sanctions for circumvention are unlikely to result in scenarios where police kick down doors and conduct 'mod-chip' raids on the homes of gamers to seize illicit technology, although such draconian policing was certainly commonplace amongst printers in sixteenth century England under the Licensing Acts. Rather, the laws are proposed to further strengthen the zoned regional markets crafted by copyright owners, and to ensure that individuals may only access that which has been approved by the creativity industries. Australia has already witnessed zero tolerance for those who distribute circumvention devices.

In 2002, Sony brought a lawsuit against Eddy Stevens for contravention of the Digital Agenda anti-circumvention provisions.<sup>6</sup> Sony's complaint lay in Stevens' supply of mod-chips for Sony's games machine, the Play Station. Games for the Play Station, like DVDs, are encoded with regional playback control. This technology allows Sony to effectively 'price-region' games and control which games are available where. The mod-chips that Stevens supplied disabled the RPC technology, and allowed gamers to purchase and play a wider range of games than what Sony permitted, sometimes at a cheaper price. The RPC technology, however, also has the function of ensuring that the Play Station is unable to play copied games. The mod-chip disables this function because it has the concomitant effect of preventing the machine from playing back-up copies of games.

At first instance, the court held that Sony's RPC technology was not covered by the statutory definition of a TPM. Justice Sackville found that regional coding does not directly prevent copyright infringement; rather it prevents pirated and imported discs being played. The Appeals Court, however, disagreed. Broadly construing the Digital Agenda's definition of a TPM, the Full Court of the Federal Court decided that regional coding did fall within the scope of the Act. Commentators have argued that this decision expanded the definition of TPMs and further tilted an already unbalanced law in favour of rights holders (Dellit and Kendall, 2003). Following this decision, it became illegal to manufacture and distribute mod-chips in Australia. Once the FTA is insinuated into domestic law it will become illegal to *use* a chipped PS2. This decision highlights the over-reaching nature of digital right legislation. Many gamers prefer to make back-up copies of their games in case anything, such as a scratch, should damage the original disc and render it unusable. When it is considered that PS2 games can cost \$100, this behaviour hardly seems unreasonable, and is certainly undeserving of criminal sanctions. Further, the FTA contains a broader definition of TPMs than that currently prescribed under domestic law - extending the definition to encompass any access control system - arguably, the decision in *Sony v. Stevens* [2002] anticipated the provisions of the agreement (Varghese, 2004).

The decision was highly criticised by the Australian Competition and Consumer Commission. The ACCC supported Sony's right to protect its products against piracy, but felt that the decision was unjust in depriving Australian consumers of the right to enjoy games legitimately purchased overseas as well as legitimate back-up copies. There is a certain amount of irony in this situation. On the one hand, Sony are cracking down on mod-chips that have non-infringing uses to play games purchased overseas and legitimate back-up copies, as well as potential infringing uses to play copied games. On the other hand, Sony sell CD writers and CD-Rs that can be used to copy software, games, music and movies. The *Sydney Morning Herald* (2003) reported that, following the mod-chip decision, online suppliers - Aussiechip - announced that they would be selling Sony recordable CDs for the explicit purpose of piracy to highlight the double standards in the court's decisions.



The adoption of the fair use doctrine would allow domestic courts flexibility in deciding cases involving new technologies that challenge the exclusivity of copyrights for uses not amounting to piracy, yet still technically prohibited under digital rights legislation, a cogent example being the ripping of purchased CDs for playback on MP3 players. The scope of fair use, however, becomes problematic when confronted with technological protection measures. In America, the fair use doctrine only applies to use of the copyrighted material, not the manner in which it was obtained. Thus there is no element of 'fairness' when dealing with TPMs and access controls. Copyright owners' implementation of TPMs as an anti-piracy control faces criticism from the perennial argument that the technology is incapable of distinguishing a non-infringing use from an infringing one. This argument was raised in *Sony v. Stevens* [2002]. Proponents of TPMs suggest that if users want to exercise fair use or fair dealing rights, they should simply locate a hard-copy version of the copyrighted material. This is hardly an adequate solution. As Dellit and Kendall (2003) state,

In the light of the increasing reliance on the World Wide Web as a way of distributing and accessing information, this suggestion is somewhat myopic. Why should individuals be denied one of the most useful research tools ever invented? (p. 52)

At present, it is not unlawful for Australians to utilise circumvention devices in order to exercise a fair dealing right. This situation is fine unless the fair dealing provisions do not cover the chosen activity. Should Australia adopt the fair use doctrine many ordinary, everyday activities will be afforded a defence, but adoption of fair use will only occur alongside the implementation of the FTA which will, ironically, criminalise the use of circumvention devices.

A possible solution lies in the clarification of fair use rights. The doctrine could be revised in order to expand its scope to introduce 'fairness' into end-users' engagements with TPMs. Digital rights legislation provides some statutory exemptions to claims of circumvention, but these, like fair dealing provisions, are precise, highly specialised and, to some extent, based on lessons learnt from US case law.<sup>7</sup> There is no accommodation of the wider needs of end-users. The result is that the *FTA Implementation Bill* will provide Australia with "a more protective copyright regime than the United States" that criminalises more activity than under current law and, further, more activity than is necessary in order to achieve the aims of copyright (Varghese, 2004). Adoption and subsequent clarification of the US fair use doctrine would inject the concept of 'fairness' (*per* Weinreb) into the Australian copyright regime, thus ensuring that ordinary, everyday activities, such as 'format-shifting' music or the modification of a DVD player in order to play movies from overseas, do not suffer under the stigma of being criminalised. Copyright owners have argued that any implementation of the fair use doctrine would result in "enormous legal costs on copyright owners and users" until the scope of rights has been established (APRA, 2004). This will certainly be the case if right owners continue to over-zealously attempt to maintain a monopoly over copyrighted materials against the public interest principle. However, as a general principle of Australian law, judges are permitted to seek advice from the decisions of their English, Canadian and American counterparts.

In the US specifically, the fair use doctrine has been a long established method of curtailing the throwback characteristics of copyright's monopolistic and censorial heritage. Given the stated aims of the FTA, it should not selectively harmonise the more draconian aspects of the respective copyright regimes, but ensure a balanced and sensible harmonisation of all aspects of copyright law, and particularly the fair use doctrine.

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<sup>1</sup> 17 Cobbett, Parliamentary History, col. 999.

<sup>2</sup> For example, see the DVD player hack list. Available from: <http://www.videohelp.com/dvdhacks.php> Accessed 29<sup>th</sup> September 2004.

<sup>3</sup> See *Gyles v. Wilcox* 2 Atk. 141, 143 [1740]. Lord Harwicke dismissed an injunction against a legal treatise that appropriated thirty-five pages from an existing work.

<sup>4</sup> At the time of writing, Apple announced plans to open an iTunes music store in Australia within the foreseeable near future.

<sup>5</sup> *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984).

<sup>6</sup> *Kabushiki Kaisha Sony Entertainment v. Stevens* [2002] FCA 906. Available from: [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2002/906.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2002/906.html). [Accessed 5 October 2004].

<sup>7</sup> For example, the statute provides exemption for *inter alia* reverse engineering of software to ensure interoperability, and provides for cryptography research, which was the subject of a legal dispute over the SDMI (Secure Digital Music Initiative) code between Professor Ed Felten (a cryptography expert resident at Princeton University) and the RIAA.