Developments in copyright
– the last 40 years

Professor Brad Sherman

This is an edited transcript of a presentation to the Reimagining copyright
for the 21st century conference, held in Canberra on 6 August 2009.

I would like to thank the Copyright Council for the invitation to speak today about the
recent history of copyright law in Australia and the lessons we might learn from this for
the future. In thinking about this topic, a number of things came to mind. The first is
that I believe that lawyers are often historians in disguise. Much of the way we talk and
think is cast in historical terms. We constantly assume that things are changing rapidly
and we obsess about how we are going to adapt to deal with different situations. We
also assume, from this perspective, that we have an almost innate understanding of the
history of copyright: particularly in relation to this recent history. One of the things that I
realised in preparing for this talk is that I really knew very little about Australian, British
or American copyright law across the course of the twentieth century. It also became
clear that I had made a number of assumptions about the things that were important in
copyright and also about their longevity.

In this talk I want to look at this recent history of copyright law. While I want to focus on
copyright law in Australia, it is impossible to distinguish it from developments in the United
Kingdom (UK). I want to start by providing an overview of the position in Australia and
the UK in the period immediately after the end of the Second World War. In the second
part of the paper, I will look at the changes that occurred in the intervening period and
try to address some of the consequences that these had for copyright law.

Post-war copyright

I will begin by providing a snapshot of the post-war period in which copyright law found
itself. At the time, there were many issues that were well-settled. It was two hundred
and fifty or so years since the Statute of Anne had been passed. Post-1911, there was a
consensus about the shape that copyright law should take. There was also a well-developed
body of copyright jurisprudence (at least in a number of specific areas). While there were
a number of similarities with the law today, what is most striking about copyright law in
the post-war period are the differences. There are five in particular that I want to discuss.

The first is that while copyright was important, it was important in a very different way
than it is today. Most policy issues that occurred over the course of the early part of the
twentieth century were in relation to language, translation, and foreign markets; these
were the key issues, along with specific problems created as a result of technological

1 Brad Sherman is a Professor of Law at the University of Queensland.

Copyright Reporter
Vol 27 No 4 (December 2009)
changes – notably in relation to radio, telegraph and broadcasting. Most of the disputes at the time were not between pirates and creators, or between pirates and copyright owners. Instead, most of the disputes that occurred were between distributors: between publishers or equivalent groups. This was because copyright activities were fairly centralised and thus fairly easy to control.

The second notable point about the immediate post-war period was the utmost importance of science. I cannot stress this enough. One of the recurring themes in the commentary at the time was the relationship between copyright, publishing and science. In the post-war period, science and technology were seen as offering solutions to many of the problems that had arisen in the aftermath of the war. Nearly all of the copyright discussions through the 1960s and the early seventies focused on scientific publications – cultural institutions didn’t get a say at all. It was very striking and important for the model of copyright that developed at the time.

The third thing that struck me about the post-war period was how agreeable everybody was and how non-politicised the debates were. I’m not saying it’s not agreeable now, but people who have been involved in copyright reform over the last 20 years would acknowledge the highly politicised nature of the copyright debates. That was not the case in the post-war period. There was a very small group of people who were interested in copyright. Libraries, universities, galleries, had little interest in copyright: that was for someone else; it was not their job. While the parties who did have an interest in copyright might have disagreed on certain things, for the most part they had a shared vision.

A fourth notable thing about the post-war period relates to the role of the consumer or the public. When decisions were made about the limits, the duration, or the scope of protection, the interests of the public as consumer and user were taken into account – and had been taken into account since the 18th century. The key difference was that it was policy makers and lawyers who took the interests of the public domain into account. Unlike the situation today, consumers did not participate in copyright debates: they were outsiders whose interests were taken into account by others.

The fifth thing – and this is the thing that struck me probably more than anything else – was the level of uncertainty that existed in the state of the jurisprudence at the time. I had assumed, for example, that fair dealing was well-defined and clear. That, however, wasn’t the case. We can get a sense of the uncertainty that surrounded the fair dealing defence from the statement made by Lord Mancroft when discussing the 1955 Copyright Bill (UK) (which became the 1956 British Copyright Act and acted as the basis for the 1968 Australian Copyright Act). In talking about fair dealing in relation to machine-based copying (primarily microfilm and photocopying) he said:

there’s been, for many years, the right of a bona fide scholar to get what he really wishes in the genuine scholars’ library; a right, I suppose which has existed from time immemorial, from the days when books where chained. The introduction of microfilms and Photostat procedures and other developments of course has produced an entirely new aspect. Every time one of these processes is used is an erosion upon the rights of the author.

Similar sentiments were reflected in the ninth edition of Copinger which said:

while there be no doubt that a student who copies passages from the
book by hand from the library would be protected by the equivalent fear dealing provision, the same would not apply to a librarian who reproduced copies by photographic means.

These remarks, like so many others at the time, show the uncertainty as to whether fair dealing applied to mechanical copying. While this is interesting in itself, I am more interested in the uncertainty that existed at the time. One of the consequences of this was that this was a period of relative openness: there were a number of different ways in which copyright law might have developed over the course of the second half of the twentieth century.

Copyright law in the later half of the twentieth century

I want to talk now about some of the changes that occurred in copyright law across the second half of the twentieth century. One important change that occurred was the retirement of Chris Creswell, a key figure in the development of Australian copyright law across the second half of the twentieth century. Another change concerned Australia’s position vis-à-vis other countries. In particular, we saw Australia change from a country that mimics the British, to a situation where we were influenced by international regimes – probably more so than some people wanted at times – to a situation where we are being pressured through bilateral treaties, maybe not to do anything we didn’t want to do, but stopping us from imagining the world differently. We also had to deal with new technologies – television; photocopier; tape-to-tape player; the video recorder; and digital technologies – all of which led to important changes in aspects of copyright. We also saw the expansion of the scope of copyright rights, and the introduction of moral rights and performers’ rights. I think, from an Australian perspective, one of the most interesting developments has been in relation to Indigenous issues. What’s been notable is that despite the effort that government bodies devoted to Indigenous issues, there has been a series of failures. If it wasn’t for the kindness, generosity and the passion of a very small group of people, and a sympathetic hearing by a particular group of judicial officers, we may not have been in the situation where we are today in relation to the application of copyright and moral rights to material produced by Indigenous creators.

While many of these changes will be familiar, what I want to talk about now is less obvious, but probably more important. This is the fact that over the last forty or so years a particular logic – a way of thinking about copyright – developed: a particular way of thinking about how copyright law operates, the way in which copyright, as an entity, circulates, and what it’s meant to do.

To understand the nature of the change I want to begin by focusing on developments that occurred in the immediate post-war period in the UK. In 1946 the Royal Society convened a 10-day conference as part of its attempt to reinvigorate science and technology. One of the issues discussed by the Royal Society was how the problem of the decentralisation of science was going to be dealt with. How were we going to do to deal with the fact that scientists were now working in places like Brisbane, Suva, or Port Moresby? How were scientists in these places able to get access to the materials that were so crucial for their work? The answer that was suggested by the Royal Society was the photocopying machine: which was seen to provide a technological solution to the problems created by the decentralisation of science. In thinking through how this solution might be applied in practice, however, the Royal Society said that a number of potential hurdles first had

Copyright Reporter
Vol 27 No 4 (December 2009)
to be addressed: one of the most important was in relation to copyright. In particular, it was unclear whether scientists were able to use photocopy machines to reproduce articles. One of the key problems related to the general uncertainty about the state of the law: particularly the confusion about the scope and nature of the fair dealing defence. Faced with the realisation that there was no hope of getting anything through parliament in the post-war period – there were too many other important things on the agenda – the Royal Society was forced to look to non-legislative solutions. One of these was the possibility – which is still pertinent today – of trying to get universities, learned societies, and other bodies to obtain copyright clearance from their authors to reproduce articles. The problem here, however, was that no one had any real idea about who owned what: again, the degree of uncertainty led the Royal Society to look elsewhere for a solution. Another option that was tried – and one that succeeded – was to form an agreement between the learned scientific societies, the publishing associations, and the scientists. Under this agreement, users were allowed to copy one article from an issue of relevant journals. The resulting agreement, which became known as the Fair Copy Declaration, was published in 1951 and covered around 120 journals. The fair copy agreement was the basis for the library copying provisions in the UK, which were later mimicked in Australia. That part is well-known. What I want to focus on, however, are the changes that occurred during that particular period of time, that mark the Fair Copy Declaration as something that belongs to another period of copyright law and that distinguishes it from the library defences.

One of the things that characterised the library copying provisions is a form of agnosticism. One might make a similar comment about the fair dealing provisions, and, indeed, copyright law in general. This is the idea that copyright law doesn’t pass judgment over works; in granting protection, we do not say that this is a better painting than another. Provided that something qualifies within a category of work, that’s sufficient; it’s for the market or someone else to decide whether it is good or bad, or whether it has any value or not.

This agnosticism made its way into policy making in the post-war period. It was also combined with a desire to universalise – a modernist feature of copyright law that had developed since the turn of the century. In the nineteenth century, there were a series of disparate copyright laws. I don’t think you could say there was a copyright law to speak of. There was law of artistic copyright, there was literary copyright, but there wasn’t a law of copyright per se.

The situation began to change in the early twentieth century, and this is a continuation of that logic where you had to develop universal, general, all-encompassing but indifferent laws. This logic underpinned the library copying provisions. The fair copy declaration issued by the Royal Society was limited to scientists; a very limited group of authors, publishers and users. However, with the change to the more universal library copying provisions, the remit of the parties involved changed. As the Gregory Committee said, a student of theology or jurisprudence is no different in essence from that of a student of chemistry or electricity, and that there’s something anomalous in the fact that a librarian may make use of the developments of modern science to save laborious hand copying in the one case without fear of penalty, whereas in almost identical circumstances the librarian must accept that, using the apparatus at his or her disposal, he or she is open to the charge of having infringed copyright by the reproduction of a substantial part of the same work. The logic was quite clear: if there is going to be a policy-based defence, it should apply universally across the board.
There were a number of subtle changes that occurred as a result of this push to universalise the library copying provisions. One of the most important of these was that there was a subtle change in the types of authors and, probably more importantly, in the types of publishers who were involved. It was non-discriminating, in a sense. A problem that arose – and it wasn't really articulated very clearly, but it was quite clear that it was an issue – was how the law should deal with this new group, given that it encompasses such disparate types of people. It's okay to say that all users might be the same, which is clearly not the case, but how do you deal with the fact that some publishers may not be as commercially motivated as others, and that different publishers may have different interests?

What was clear during that period in Australia, the United Kingdom, and at the international level, was that there was a particular way of thinking about copyright law. It was assumed that the overarching motive for people involved in the creation and distribution of copyright works was commercial. This was the starting principle for organising the shape of the rules and how they were organised. In this situation, non-commercial entities were cast as an exception. In formulating the library copying provision, non-profit organisations were seen as exceptions to the general rule that presumed that copyright was driven by commercial concerns. There are a number of consequences of this commercial logic which I think continue to shape the law today.

Firstly, and one of the most immediate things noticeable at the national and international level, is that it immediately changed the way the policy makers viewed technologies. While the Royal Society had seen the photocopying machine as a potential solution, suddenly the photocopier came to be seen as a problem.

The second consequence, and this is something that bedevils teachers of intellectual property today, relates to the idea that the role of copyright law is to balance the interests of the competing parties. While you can see fragments of this logic at work in the eighteenth and nineteenth centuries, the idea that the role of the law was to balance the interests of creators, distributors and users did not come to dominate copyright thinking until the post-war period. Once it was presumed that the various players involved with copyright were motivated by commercial goals and, correspondingly, that they were in opposition to each other, the role of the law became one of mediating and balancing the competing interests. As a result, one of the most common policy questions asked over the last two decades has been: “have we drawn the appropriate line that balances the competing interests?”

Another change that occurred at the time related to the way the actors were distinguished. Copyright law has long distinguished different agents by reference to their relationship to the copyright work: whether a person was a creator, a distributor, or a user. It's a long and well-known distinction. Under the “fair copy” arrangement, however, people were linked by the fact that they belonged to learned societies; in a sense, they had a shared vision and goals. One of the differences with the post-war legal arrangements is that the key players in the equation (the authors, the publishers and the users) came to be linked juridically (at least in theory). They came to be linked by law, either through contract or by status. If you were an employee of someone and you created a work, it was their work. Suddenly, the law became a key factor that shaped the way that the law viewed copyright-based industries. (One of the criticisms made of the Creative Commons movement by a number of people has been that it repeats this legal logic; it overlays law in situations where it's simply not needed.)

One of the consequences of this oppositional commercial logic, and the resulting juridification of the relationship between the actors, was that it changed the way that
people engaged with copyright. In the immediate post-war period, librarians had little apparent knowledge or interest in copyright. However, over the course of the 1960s and 1970s, copyright suddenly became a key issue for librarians who increasingly played an active role in copyright policy. At the same time, the standing of the end user also changed. While end users have been taken into account by policy makers as a theoretical component, they suddenly became an active player in the copyright debates. At the same time the role played by the end user also changed: an end user was simultaneously a consumer, a pirate, and also, following Marshall McLuhan, a publisher. As a result, the end user became a very complicated figure in this post-war period.

The fifth and final change that occurred in the second half of the twentieth century, which flowed on from these changes, is it served to politicise or, if you have a longer memory of the history, to repoliticise copyright. It served to develop a model dominated by this oppositional logic – and I think it’s one of the reasons why so many of the debates over copyright matters in Australia were so protracted.

**Conclusion**

While many aspects of copyright law were settled by the end of the Second World War, there were many areas of confusion and uncertainty: the fair dealing defences were unclear; there were no library copying provisions; and there was uncertainty at the international level about whether photocopying was a form of reproduction. As a result, there was, as I noted earlier, an opportunity for the law to develop in a number of different ways. The 1951 Fair Copy Declaration – which was consensual in nature and focused on a specific group of creators, distributors and users – exemplifies one possible way copyright law might have developed. Instead, copyright law took a different course. It adopted a logic that was universal, oppositional, legal, and commercial in nature. The adoption of this logic shaped copyright over the second half of the twentieth century.

Seeing copyright history in this manner can help to explain a number of things that happened over the second part of the twentieth century. It can help to explain, for example, why Australia, as with many countries, had so many difficulties dealing with moral rights: people didn’t really know what to do with them because they didn’t fit within the logic that had developed. Performers also fell victim to this problem because they didn’t fit comfortably within the oppositional logic that dominated at the time. The particular model that was adopted was also not appropriate to deal with Indigenous creations; and it is one of the reasons why people are turning to other areas or other models – such as geographical indications – as a basis to protect Indigenous interests.

I want to end to answer the question that I asked at the outset, namely what lessons can we draw from the history of copyright for its future? I think that Francis Gurry’s comments that the nature of international treaties will have to change in the future provide a useful basis from which to answer this question. In effect, what he was saying was that we need to shift from the universalising international treaties to a situation where the international bodies will have to take on much more focused, nuanced roles. In this new world, the focus of attention will be on copyright defences for Braille, rather than general discussions about fair dealing: the discussions will (and already have) become more focused. In many ways we are returning to pre-modern nineteenth century intellectual property law where people were focused on specific, industry specific arrangements. It is also possible to imagine a similar future for Australian copyright law: one that is not dominated by a
logic that is oppositional, commercial and legal in nature. It is possible to imagine new “fair copy declarations” being developed, where bodies start to think through things on a more consensual basis. One of the consequences of realising that the oppositional logic that pervades our current thinking about copyright is a creature of the second half of the twentieth century is that it might encourage us to think more creatively about how copyright law might develop in the future.