

11th Annual Copyright Conference

Friday, 17 February 2006

Program

- 9.00-9.30 **Registration**
Level 22, Waterfront Place, 1 Eagle Street, Brisbane
(Offices of Minter Ellison Lawyers)
- 9.30-10.45 **Session 1**
Opening Address
The Hon Justice Andrew Greenwood, Federal Court of Australia
- Professor Pam Samuelson**, Professor of Law and Information Management, Chancellor's Professor and Director, Berkeley Center for Law and Technology, University of California, Berkeley, *Copyright and Consumer Protection*
- Helen Daniels**, Assistant Secretary, Copyright Law Branch, Attorney-General's Department, *An Overview of the Government's Copyright Reform Agenda*
- 10.45-11.15 *Morning Tea*
- 11.15-12.15 **Session 2**
John Nicholas, SC, Nigel Bowen Chambers, Sydney, *Copyright and the Courts*
- Kim Weatherall**, Associate Director (Law), Intellectual Property Research Institute of Australia (IPRIA) and Lecturer, Law School, The University of Melbourne, *Drafting the Oz-DMCA: The New Anti-Circumvention Law in Australia*
- 12.15-1.30 *Lunch* (Sponsored by LexisNexis)
Brisbane Polo Club, Naldham House, Cnr Eagle & Felix Streets, Waterfront Place, Brisbane
- 1.30-2.30 **Session 3**
John Tuck, Head of British Collections, British Library, *Copyright Issues in a National Legal Deposit Library Context*
- Chris Creswell**, Copyright Law Consultant, Copyright Law Branch, Attorney-General's Department, *The Copyright Act: "Looking Forward, Looking Back" (apologies to Slim Dusty)*
- 2.30-3.00 *Afternoon Tea*
- 3.00-4.00 **Session 4**
Richard Mallett, Director Mechanical Licensing, Australasian Performing Right Association (APRA), *Digital Distribution Channels – Threat or Opportunity?*
- Dr Matthew Rimmer**, Associate Director and Senior Lecturer in Law, Australian Centre for Intellectual Property in Agriculture (ACIPA), The Australian National University, *Google: Search or Destroy*
- 7.00 **Conference Dinner** (for those who have registered)
Watt Modern Dining, Brisbane Powerhouse, 119 Lamington St, New Farm

The Speakers

Session 1

Professor Pam Samuelson

Copyright and Consumer Protection

Consumer interests have largely been ignored or rebuffed in many recent copyright cases. Several legislative proposals to strengthen further the rights of copyright owners are directly aimed at consumer behaviour. Indeed, the entertainment industry and key members of Congress seem to be actively hostile to consumers these days, especially to those consumers who engage in unauthorised file sharing of copyrighted music and movies. Proposals to make uploading of copyrighted works a felony, even if done recklessly, to give the Justice Department authority to bring civil actions against file sharers, and to immunise copyright owners who attack file sharers' computers are expressions of Congressional hostility to consumers. Consumer protection has, however, had a significant role in copyright law. Copyright law contains many exceptions and limitations on authors' rights that are either expressly intended to protect consumer interests (eg, allowing consumers to make backup copies of software) or have been interpreted as protecting consumer interests (eg, allowing consumers to make copies of TV programs for time-shifting purposes). There are, moreover, significant gaps in regulation that allow consumers to make many unauthorised uses of copyrighted works, for example, to privately perform music in the privacy of their homes because copyright only regulates public performances of protected works. I am among the many intellectual property scholars who believe that consumers have "rights" under copyright law, not merely privileges to do certain things (which can be rescinded by license terms or technical protection measures) or defences that can be raised if copyright owners sue them. I predict that copyright law will evolve to become an important source of consumer protection in the 21st century.

Pamela Samuelson is the Richard M. Sherman Professor of Law at the University of California at Berkeley, a Director of the Berkeley Center for Law & Technology and an advisor to the Samuelson High Technology Law & Public Policy Clinic at Boalt Hall. She teaches courses on intellectual property, cyberlaw and information policy. She has written and spoken extensively about the challenges that new information technologies pose for traditional legal regimes, especially for intellectual property law. She is a Fellow of the Association for Computing Machinery (ACM), a Contributing Editor of Communications of the ACM, a past Fellow of the John D. & Catherine T. MacArthur Foundation, and an Honorary Professor of the University of Amsterdam. She is a member of the Board of Directors of the Electronic Frontier Foundation and of the Open Source Application Foundation, as well as a member of the Advisory Board for the Electronic Privacy Information Center.

Helen Daniels

An Overview of the Government's Copyright Reform Agenda

The presentation will provide an overview of the Government's copyright reform agenda including:

- an update of the areas of copyright reform identified in the 2004 election policy statement Strengthening Australian Arts (eg, legislative developments, the review of fair use and other possible exceptions, improved enforcement measures to address copyright piracy and Government ownership and use of intellectual property)
- other reviews initiated by the Government (eg, the scope of the scheme limiting remedies available against carriage service providers)
- international developments (eg, new Free Trade Agreements under negotiation)
- priorities for the year ahead.

Helen Daniels is the Assistant Secretary of the Copyright Law Branch of the Attorney-General's Department. Apart from a three year period working in the privacy and freedom of information law areas of the Department, she has worked in copyright law policy since 1985. Ms Daniels has been involved with a number of legislative reforms to the Copyright Act 1968, including the digital agenda reforms, moral rights and the amendments to meet Australia's obligations under the Australia-US Free Trade Agreement. Ms Daniels has represented the Government at various international meetings and is a former member of the Copyright Law Review Committee.

Session 2

John Nicholas

Copyright and the Courts

Over the last year a number of important copyright cases have been decided in Australian courts, including *Stevens v Sony*, *Universal Music v Cooper* and *Universal Music v Sharman (Kazaa)*. In this paper, John Nicholas SC will offer insights into these decisions, particularly in so far as they are concerned with the communication right, authorisation and common design. He will also offer commentary on the judiciary's approach to date in its treatment of these matters in the digital/on-line environment and on various jurisdictional issues relevant to the communication right and its enforcement.

John Nicholas is a barrister based in Sydney specialising in intellectual property. He has appeared as counsel in numerous significant cases including three important cases decided in 2005 — *Stevens v Sony*, *Universal Music v Cooper* and *Universal Music v Sharman (Kazaa)*.

Kim Weatherall

Drafting the Oz-DMCA: The New Anti-Circumvention Law in Australia

The Australian government is in the midst of drafting what could be called the 'Oz-DMCA': legislation that will implement Article 17.4.7 of the Australia-United States Free Trade Agreement, an article itself modelled all-too-closely on the United States Digital Millennium Copyright Act of 1998 (DMCA). The DMCA, although perhaps not yet the complete disaster doomsayers predicted, has still been controversial from the start in the US, has generated much strange and disturbing litigation, and is, of course, at least 7 years or so out of date. It also reflects, in structure, the US political and legal system that gave it birth. Nevertheless, whichever way you look at it, from a pragmatic perspective, Australia has to implement Article 17.4.7. In this paper, I'm interested in how (a small branch economy country like) Australia should go about this implementation? In particular, how should questions of exceptions — one of the few areas where real flexibility would appear to lie in the treaty text — be managed? I argue that we are not just drafting a series of laws, but creating a system for managing the conflicting interests inherent in digital rights management. We need, therefore, to construct the system with regard to its immediate effects, but also its dynamic effects — the way that the structure of the system itself changes

the incentives and constraints facing various interest groups. To that end, I look at a set of areas where exceptions might be granted, and explore the incentives and constraints facing different players involved. The aim is to move beyond the 'should we do it like the US does', to how Australia manages the realpolitik and legal constraints.

Kimberlee Weatherall is the Associate Director (Law) at the Intellectual Property Institute of Australia, an interdisciplinary research centre based at the University of Melbourne and including researchers from the Melbourne Law School, the Melbourne Business School and the Melbourne Institute of Applied Economic and Social Research. She lectures at the Melbourne University Law School, in intellectual property and information technology law. Kim holds postgraduate degrees from Oxford and Yale University, and has published and spoken on a range of intellectual property issues. Kim is active in Australian public policy debates regarding IP: she has made submissions to all the recent major reviews of IP, and, in relation specifically to anti-circumvention law, appeared before both the Senate Select Committee when it considered the IP aspects of the Free Trade Agreement with the US, and before the House of Representatives Legal and Constitutional Affairs Committee considering exceptions to Australia's new laws on technological protection measures in copyright. She is a regular commentator on intellectual property issues, through the media and two blogs, Weatherall's Law (<http://weatherall.blogspot.com>) and LawFont (<http://www.lawfont.com>).

Session 3

John Tuck

Copyright Issues in a National Legal Deposit Library Context

An understanding of copyright and copyright law is increasingly important for any librarian and knowledge worker. Once, in the world of print, it was possible to get by with a knowledge of fair dealing and the text on copyright declaration forms. Now the electronic environment has blurred national boundaries and the global competitive market has generated rights holder aggression. Shortcomings of existing copyright legislation and new legislation extending legal deposit to non-print have added extra complexity to the life of the librarian in managing access to collections. Through a number of examples, the presentation will seek to illustrate both challenges and opportunities for a national library:

- a) influencing governments, strategy and policy: with reference to recent UK parliamentary/government reviews of IPR
- b) the Legal Deposit Libraries Act 2003 and managing access to non-print, including archiving the web
- c) the impact of new players such as Google and Microsoft
- d) practical service issues, eg, impact on document delivery; electronic signatures; fair dealing v commercial use; scanning devices in reading rooms
- e) protecting and exploiting our own rights and collections: raising awareness and income.

These examples will help to define the role of a national library in the copyright arena.

John Tuck has been Head of British Collections at the British Library since October 2002. Prior to that he was Deputy to the Director of University Library Services and to Bodley's Librarian at the University of Oxford (1998-2002) and for twenty years (1977-1997) worked in various roles at the John Rylands University Library, University of Manchester. Copyright issues have followed him around.

Chris Creswell

The Copyright Act: "Looking Forward, Looking Back" (apologies to Slim Dusty)

In this paper I look back over the many amendments to the Copyright Act since 1968 when the principal Act was passed. I categorise the amendments made according to whether they confer more rights on copyright owners, afford more access to users of copyright materials, are driven by external regulatory, criminal law, administrative or judicial reforms, were necessary to comply with existing or new international obligations or to avoid constitutional invalidity, or simply implemented new drafting style (such as gender neutrality). I note that many of the amendments drew on the recommendations of committees of inquiry, as indeed did the principal Act itself. I plot the path of the successive amendments and question whether they display any general trends that might be a guide to the future direction of copyright law reform.

Chris Creswell is a consultant to the Copyright Law Branch in the Attorney-General's Department in Canberra. Before December 1998, he had been the Assistant Secretary in charge of the Branch for a total of 13 years commencing in July 1981. In that time major amendments to the Copyright Act have been enacted, including those on performers' rights, parallel importation and statutory licences. He was a member of the Copyright Law Review Committee for a number of its reports including those on computer software protection and, more recently, on copyright and contract. He has had long experience in international copyright negotiations and led the Australian delegation to the WIPO diplomatic conferences on copyright in 1996 and 2000.

Session 4

Richard Mallett

Digital Distribution Channels: Threat or Opportunity?

Digital Downloads, Mobile TV, VOD, DVB-H, IPTV, P2P can arguably be traced back to the launch of the CD and CD Players in 1982. All these technologies rely on the digitisation of content: copyright content. On one level the distribution of content in today's environment bears little if any resemblance to content channels available in the early 1980s. I doubt whether anyone could have predicted which new technologies would develop – or more importantly, which would stick. On the other hand, we still consume all of this content via a screen or through speakers/headphones; that hasn't changed.

This presentation will attempt to shed some light on the licensing approach that the Australasian Performing Right Association (APRA) and the Australasian Mechanical Copyright Owners Society (AMCOS) have taken to these new technologies and to answer in part questions like: What new licensing arrangements have music APRA and AMCOS offered for these new distribution channels? How has the response of APRA and AMCOS to dealing with new technology music services differed, if at all, to that of the record labels? Do new distribution channels merely cannibalise existing revenue streams or add to the revenue pot? What new systems are required to process the vast volume of transactions? And, who the hell invented ringtones and why?

Richard Mallett is the Director, Mechanical Licensing at the Australasian Performing Rights Association (APRA). Knowing very little about copyright before he joined APRA in 1996, the journey since for him has been interesting and entertaining. Richard previously worked in a number of planning roles both in Australia for the Australian Broadcasting Authority, and in the UK for the Environmental Protection Agency and the Royal Mail. His current role as APRA's Director, Mechanical Licensing, covers the traditional business of record manufacture and what he feels will be its ultimate successor: ringtones and digital downloads. APRA has sought to position itself as a forward thinking rights organisation: prepared to engage with potential licensees and keen to play its part in the development of new revenue streams for its and AMCOS' members.

Dr Matthew Rimmer

Google: Search or Destroy?

In the past year, there has been much debate about Google and the implications of the search engine's activities for copyright law, privacy, and competition. In December 2004, Google announced that it had entered into agreements with four university libraries and the New York Public Library to "digitally scan books from their collections so that users worldwide can search them in Google." The search engine claimed that this would be an "expansion of the Google Print program, which assists publishers in making books and other offline information searchable online." In September and October 2005, the Authors Guild and the Association of American Publishers filed lawsuits in the United States, alleging that the Google Library program had infringed copyright in literary works through its unauthorised scanning and copying of books. In response, Google declared that it respected copyright: "The use we make of all the books we scan through the Library Project is fully consistent with both the fair use doctrine under U.S. copyright law and the principles underlying copyright law itself, which allow everything from parodies to excerpts in book reviews." This paper will explore the legal issues surrounding Google from the perspective of lawyers, librarians, authors, publishers, and consumers. Will the search engine become an infinite library? Is it the saviour of the public domain? Or is Google violating the copyright of authors and publishers? Does the search engine respect privacy? Or does it encourage surveillance? Does Google have the potential to become a monopolist? Or will the search engine provide much needed competition for Microsoft?

Matthew Rimmer is an Associate Director of the Australian Centre for Intellectual Property in Agriculture (ACIPA) and a Senior Lecturer in Law at The Australian National University. He holds a Bachelor of Arts with Honours and a University Medal in literature, and a Bachelor of Laws with Honours from The Australian National University. Matthew received a Doctorate of Philosophy from the School of Law at The University of New South Wales for his thesis: "The Pirate Bazaar: The Social Life of Copyright Law". He has published widely on copyright in journals in Australia, Europe, and the United States.