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Announcements

Copyright Law: Papers by Professor Graeme W. Austin, Professor of Law, Victoria University of Wellington

Copyright Law is the first in 2021 of several issues of the Victoria University of Wellington Legal Research Papers. Belt-tightening necessitated by the COVID-19 pandemic will limit the 2021 volume to 25 papers, with fewer issues than normal. The Student/Alumni Sub-Series has been put on hold, we hope for not more than two years, but the position will not be clear for some time. VUW Faculty of Law **authors** will continue to post papers to the SSRN website, where they will be fully searchable, but they will appear more slowly in the VUWLRP.

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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES **VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS**

"Megaupload in New Zealand's Highest Court"

Journal of the Copyright Society USA (Forthcoming 2021)

Victoria University of Wellington Legal Research Paper No. 1/2021

GRAEME W. AUSTIN, Victoria University of Wellington

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With the long-awaited November 2020 decision of the Supreme Court of New Zealand in *Ortmann et al. v. United States of America* an important milestone was reached in the saga involving the allegations of criminal copyright infringement against the individuals involved with the Megaupload group of companies. Four of the individuals – the appellants in the case – have been resident in New Zealand for a number of years. Holding in favor of the United States, this country's highest judicial body held that the criminal provisions in the New Zealand Copyright Act 1994 provide a legal basis for

extradition to the United States. While the New Zealand chapter is not quite completed (a number of administrative law matters require further determination – and the final decision, to extradite, remains vested in the Minister of Justice), the copyright law aspects of the case are now closed. The case saw the New Zealand judiciary struggling with outmoded legislation that, on its face, appears not to have kept pace with new forms of criminal piracy via digital networks. While many other parts of New Zealand’s copyright legislation reflect a commitment to technological neutrality, its criminal provisions do not. It also illustrates the relevance of international copyright law in domestic law controversies. International law was invoked by the Court to explain its expansive interpretation of the criminal provisions. International law was also invoked by the appellants, in an attempt to narrow the application of the same provisions, an argument that ultimately failed. Finally, the case offers a perspective on “copyright transplants,” aspects of one nation’s copyright laws incorporated into those of another. The relevant provisions were the New Zealand equivalent of the safe harbor provisions in § 512 of the Copyright Act 1976 (U.S.). Ortmann advances a unique approach to the safe harbors, holding that they formed part of the substantive case against the appellants. The United States was required to establish, as an element of liability, that the safe harbors did not apply – quite a different approach from that suggested by the precursor U.S. legislation. Section 512 of the U.S. Copyright Act merely limits the remedies to which an internet service provider is exposed. While the Court’s reasoning on this point is difficult to reconcile with the statutory text or the legislative provenance, the Court’s conclusion is unlikely to make much of a difference in future cases: facts establishing that a civil or criminal defendant could not shelter in the safe harbors are likely to be the same facts that would also establish liability.

"This Is a Complex Issue': A Few More Questions about Fair Use"

Australian Intellectual Property Journal, Vol. 28, No. 3, 2018, 97-106

U of Melbourne Legal Studies Research Paper No. 808

Victoria University of Wellington Legal Research Paper No. 2/2021

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Taking the lead from the government’s comment that the scope of copyright exceptions is a “complex issue”, this article raises three questions that could benefit from further discussion during deliberations on the Productivity Commission’s recommendation that a US-style fair use standard be incorporated into Australian copyright law. First, it asks whether Australian courts would derive much guidance from US case law, given the doctrinal uncertainty that exists in US fair use jurisprudence. Second, it questions whether an Australian version of fair use would necessarily be applied in cases involving new technological uses of copyright protected works, rather than the production of new works of authorship. Third, it asks whether sufficient attention has been given in the fair use debate to the incentives needed to create functioning markets for copyright-protected works.

"Before and After Designers Guild: Another Look at Appellate Deference in New Zealand's Copyright Law"

Victoria University of Wellington Legal Research Paper No. 3/2021

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This paper considers how Designers Guild has affected New Zealand’s copyright law, using as its springboard two decisions of the New Zealand Court of Appeal: one before and one shortly after the Supreme Court’s apparent endorsement of the approach to appellate deference that was adopted by the House of Lords. The paper argues that the special characteristics of New Zealand’s copyright law — including the dominant use of copyright as a vehicle for protecting the designs of functional products — should provoke some further scrutiny of whether deference to trial courts’ findings on the substantiality of copying continues to be appropriate.

Forthcoming in: *Transition and Coherence in Intellectual Property Law* (Cambridge University Press 2020), Chapter 3.

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About this eJournal

Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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