LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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Announcements

Special Issue: Selected Scholarship by Graeme Austin - Intellectual Property and Other Topics Part One

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"The Two Faces of Fair Use"
New Zealand Universities Law Review, Vol. 25, p. 285, December 2012
Victoria University of Wellington Legal Research Paper No. 1/2013

GRAEME W. AUSTIN, Victoria University of Wellington
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Responding to suggestions that the “fair use” defence in US copyright law should be exported to other jurisdictions, this article scrutinises the different ways in which the defence has been applied in decisional law. Fair use cases fall into two broad categories. First, the defence has been applied to ensure that the exercise of the copyright monopoly does not significantly fetter downstream creativity by other authors. Here, the prevailing doctrine requires that the defendant’s use be genuinely “transformative”, which, at the very least, requires the defendant to be using the plaintiff’s work in new and creative ways – transforming it into something new. Secondly, fair use has been applied to new technological innovations – such as digital search engines – that do not themselves transform the underlying works, but instead often provide new ways of disseminating copyright-protected material. The paper argues that only the first use of the fair use defence is consistent with traditional fair use doctrine. Accordingly, if policy makers anticipate that fair use should be applied in a way that shields technological entrepreneurship from copyright litigation, they ought to make that clear. Even if that approach were adopted, however, it is questionable whether fair use litigation is an appropriate vehicle for facilitating technological development. The final part of the article explores some of the problems that might arise through this kind of “economic regulation through litigation.”

"Radio: Early Battles Over the Public Performance Right"
Copyright and the Challenge of the New, Brad Sherman and Leanne Wiseman, eds., Wolters Kluwer, 2012
Victoria University of Wellington Legal Research Paper No. 2/2013

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Focusing on US Senate Bill 2600 (1924), this paper traces some of the early legislative battles over the scope of the public performance right in the context of radio broadcasting. Had it passed, the bill would have created an exception to the exclusive rights of the copyright owner recited in section 1 of the Copyright Act of 1909 by providing that "the copyright control shall not extend to public performances...by use of the radio..." This study provides another context in which to understand copyright's interaction with notions of the "public interest."

"Importing Kazaa - Exporting Grokster"
Santa Clara Computer & High Technology Journal, Vol. 22, p. 577, 2006
Arizona Legal Studies Discussion Paper No. 06-08
Victoria University of Wellington Legal Research Paper No. 3/2013

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This paper examines some of the international implications of the U.S. Grokster litigation and the parallel Kazaa case that was recently decided by the Federal Court of Australia. Neither court

addressed the international aspects of the holdings. This is a significant gap: P2P products and services are disseminated globally; many of the users of these products and services and a number of the defendants in the cases were located beyond the forum; P2P business models often involve division of corporate activities between different jurisdictions; and the files that are shared on P2P networks often traverse international borders.

The paper analyzes Australian and U.S. copyright legislation and doctrine to assess what the law on P2P products and services might look like if courts confronted more directly the international character of copyright issues that arise in the P2P context. It then identifies a distinction between de jure and de facto extraterritoriality. De jure extraterritorial application of domestic copyright law occurs when legislatures and courts develop liability theories that involve the direct application of one nation's copyright laws to activities that occur in foreign territories. The communication tort recently enacted into Australian copyright law is an example of de jure extraterritoriality: Australian copyright law expressly applies to communication of copyright protected material to and from Australia - thereby offering the potential for Australian copyright law to apply to communication of copyright material that reaches the public in foreign jurisdictions. The concept of de facto' extraterritoriality is illustrated by Justice Breyer's Grokster concurrence. Justice Breyer's concurrence suggests that the Sony safe harbor should be capacious, with the probable result of more unlicensed circulation of copyright protected works. One problem with Justice Breyers approach, a problem not addressed in the Grokster opinions, is that circulation of copyright protected works on networks with global reach may have the effect of imposing a policy balance that is struck with U.S. conditions in mind on the rest of the world - including countries in which the balance between technological development and copyright protection is viewed differently. The paper concludes by suggesting that the Berne Convention offers legal actors a source for principles that might assist in resolving the tension between extraterritorial application of domestic copyright law and territorial sovereignty.

This paper was presented at the Santa Clara University School of Law Conference on Third Party Liability in Intellectual Property Law on October 7, 2005, and will be published in a Symposium issue of the Santa Clara Computer & High Technology Law Journal in 2006.

"The Berne Convention as a Canon of Construction: Moral Rights after Dastar"
NYU Annual Survey of American Law, 2005
Victoria University of Wellington Legal Research Paper No. 4/2013

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This article advocates greater use of public international law instruments to assist with the interpretation of domestic intellectual property statues. Basing its analysis on the 2003 decision of the United States Supreme Court, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003), in which the Court declined to interpret section 43(a) of the Lanham Act (which inter alia enacts civil liability for misleading representations as to the "origin" of goods) as encompassing misleading representations as to the "intellectual origins" of informational products, the article argues that the Supreme Court's construction of section 43(a) of the Lanham Act was: (1) inconsistent with the requirement in the Berne Convention that member states protect authors' moral rights; and (2) also inconsistent with the requirement, articulated by Justice Marshall in The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804), that congressional law should be interpreted consistently with public international law obligations. The Charming Betsy rule implies that, in construing ambiguous statutes, achieving consistency with public international law obligations must

be based on an available construction of the statute. Public international law instruments are of less assistance when legislatures have made it "crystal clear" that an inconsistent meaning was intended. Accordingly, the article presents a general critique of the reasoning in Dastar, and argues that a more "Berne-consistent" approach to section 43(a) of the Lanham Act was available to the Court. The article then explores ways that cognate Commonwealth jurisdictions have invoked the Berne Convention to assist with the construction of ambiguous domestic statutes. Finally, it advocates a greater role in U.S. statutory construction for the presumption that Congress legislates consistently with the federal government's public international law obligations, and concludes by exploring the implications of this approach to statutory construction for U.S. copyright law.

"Property on the Line: Life on the Frontier between Copyright and the Public Domain"
Victoria University of Wellington Legal Research Paper No. 5/2013

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This article is an edited transcript of Professor Graeme W Austin's Inaugural Lecture, delivered in the Council Chamber of Victoria University of Wellington on 15 November 2012. Professor Austin was appointed Chair in Private Law in the Faculty of Law in November 2010. This lecture explores claims that in copyright law, the public domain is necessarily in opposition to proprietary rights, and suggests that in many contexts the incentives offered by copyright contribute to the vibrancy and volume of material that is available for downstream creativity and innovation. Drawing on his earlier work on the relationship between human rights law, Professor Austin's lecture advances the idea that cognisance of the human rights dimensions of intellectual property, including creators' human rights, should inform conceptions of the property domain of copyright law. The lecture concluded with a warning against the "Walmartization" of copyright, according to which the only policy concern is lowering the price that consumers pay for copyright-protected material.
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About this eJournal

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 Massachussetts 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 Judicial 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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