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Book Review

Drafting Copyright Exceptions: From the Law in Books to the Law in Action

by Emily Hudson, 2020, Cambridge University Press, 380 pages, Online ISBN 9781107338012, DOI 10.1017/9781107338012, £95 (print edition) \$100USD (eBook) and available via institutional purchase at Cambridge Core

Review by Chris Morrison, Copyright, Licensing and Policy Manager at the University of Kent

Drafting Copyright Exceptions: From the Law in Books to the Law in Action by Emily Hudson is essential reading for anyone responsible for managing copyright in libraries and educational and research institutions. Hudson's monograph presents insights from thousands of hours of empirical research with hundreds of copyright practitioners in the cultural heritage sector. It reveals important findings about the way that copyright exceptions are interpreted in practice and the implications this has for the formation of norms and the drafting of copyright exceptions.

Hudson's research focuses on copyright law and associated practices of cultural heritage institutions in Australia, Canada, the United Kingdom (U.K.) and the United States (U.S.). The key premise of the book is that traditional 'doctrinal' analysis of copyright exceptions fails to fully understand the decisions made by people in real world situations. This is particularly relevant given the extent to which levels of copyright literacy may vary on an individual, institutional or national basis.

The book is structured in three parts. Part I provides the legislative background and a summary of the empirical findings, in addition to an exploration of the rules and standards literature. Part II provides an overview of the ways that copyright exceptions have been interpreted by institutions in the chosen countries. Finally, Part III draws out implications for the future, both in formulating and communicating new norms and practices within the sector and in the drafting of legislation.

The countries Hudson chose to explore in this book provide rich opportunities for comparison and reflection on different legislative approaches. All jurisdictions are based on the common law system, but the adoption of fair use in the U.S. and the different iterations of fair dealing in Australia, Canada and the U.K. represent different approaches to the specificity of law making. However, Hudson's (2020) analysis of the rules and standards literature in chapter 2 provides an important critique of the "well-worn tropes that 'fair use is flexible but unpredictable' and 'detailed provisions provide certainty but are

rigid” (30). She reveals a more nuanced picture of the ways that laws are both formulated and interpreted, identifying a range of other cultural and social factors that influence decisions made by those managing and providing access to collections of cultural works. She therefore warns against the temptation of the ‘fair use panacea’ which suggests that access to cultural heritage is best supported by open ended exceptions in all cases.

Part II of the book looks in-depth at activities and case law across the countries. It starts with an exploration of sector-specific exceptions which identifies the extent to which these support preservation of and access to collections. Hudson goes on to examine fair use in the U.S., as set out in [section 107 of the U.S. Copyright Act](#), and the way that this impacts on the activities of American institutions. She concludes that fair use plays a major role in informing decision making. This is followed by an analysis of Section 200AB in Australia, which was an attempt to provide some fair use-like flexibility for cultural institutions. The final chapter in Part II considers fair dealing in Canada following the *CCH* case ([CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, \[2004\] 1 SCR 339](#)). These chapters reveal the failure of [Section 200AB](#) to deliver its intended benefits in Australia, and that cultural institutions in Canada did not take full advantage of the strong pro-user interpretation of fair dealing in the *CCH* case. However, as previously indicated, Hudson points out that these differences are not the result of the drafting of the legislation alone.

The final part of the book focuses on implications for the future. Hudson is able to draw on the longitudinal nature of her research to identify changes in attitudes and practices over time. This is particularly relevant with regard to Canada and the U.K., where legal action and legal reform respectively appear to have prompted a less cautious and potentially self-restricting set of practices. This highlights that development of copyright literacy within the sector is a complex phenomenon influenced by a range of factors beyond the drafting of legislation alone. This leads on to the final chapter where Hudson returns to the ‘fair use panacea’ and examines the extent to which fair use would provide benefits to the cultural heritage sector if it was to be adopted beyond the U.S. Her conclusion is that it is an important solution to the problems that copyright can present, but that it is not the only solution. From a legislative perspective, well-crafted rules can still play a vital function in enabling access to cultural heritage. And from a practical perspective, it is important that those in the sector (many of whom are not legally trained) are supported in developing and sharing their own interpretations of copyright law.

This book provides an important intervention by introducing an extensive socio-legal perspective on the challenges of copyright law for libraries, galleries,

archives and museums across multiple jurisdictions. Whilst it would be interesting to get further insights from cultural heritage institutions outside the English-speaking countries, chosen this is clearly outside the scope of the research project. The book comprises insights from hundreds of interviews in addition to a detailed analysis of the history and applications of copyright exceptions in four different jurisdictions. As such is a significant achievement which will support future insights into copyright exceptions. However, this presents perhaps the key challenge when critically examining the book which is that of accessibility.

Drafting Copyright Exceptions is a well-structured and clearly written piece of legal scholarship which identifies the limitations of purely doctrinal research in understanding the law in action. But its insights are written in terms that may be difficult for those without legal training to fully appreciate. In addition, it is published as a monograph with a high purchase price which presents a barrier to access for those without an institutional subscription or the funds to purchase it. This is not unusual for legal scholarship where open access publishing for monographs is not widespread.

This final challenge therefore is not laid solely at the door of the author of this book. Rather it is a challenge for all copyright specialists within the cultural heritage sector collectively to consider how to collaborate on drawing out the lessons that this book provides and develop practices to promote copyright literacy and progressive legal reform. Only then can the the prevailing paradigm of caution and restriction of access to education and culture be challenged.

Chris Morrison is Copyright, Licensing and Policy Manager at the University of Kent. He began his career in copyright at collecting society PRS *for* Music and moved to the library sector in 2009 when he became Copyright Assurance Manager at the British Library. He has a masters in copyright law with distinction from King's College London and is a member of the Universities UK/GuildHE Copyright Negotiation and Advisory Committee and the UK Government's Copyright Education Awareness Group. He is co-author (with Dr Jane Secker) of the book *Copyright and E-Learning: A Guide for Practitioners*. He and Jane also co-founded of the award-winning blog copyrightliteracy.org and co-chair the Association of Learning Technology's Copyright and Online Learning Special Interest Group.

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