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Emily Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action*, (Cambridge University Press, 2020) 380 p.p., Hardcover: £77.23, ISBN: 9781107338012

The importance of exceptions to copyright infringement as a counterweight to the ever-expanding protection offered to rights-owners as regards term, scope and subject matter, is well known to copyright lawyers and scholars. Indeed, there is now voluminous scholarship concerning numerous aspects of copyright exceptions including their justification, proper role in a copyright system, history and future reform. Yet, despite recognition at policy-level of the importance of an ‘evidence-based approach’ to copyright (para 2.1, Report of Ian Hargreaves, May 2011 *Digital Opportunity: A review of Intellectual Property and Growth*) and the growing body of empirical work on copyright generally (for instance, the *Copyright Evidence Wiki*, hosted by CREATE, University of Glasgow currently catalogues 820 empirical studies: copyrightevidence.org) empirical work on how exceptions actually operate ‘on the ground’ and are understood and applied by non-legal actors has been sparse. In *Drafting Copyright Exceptions: From the Law in Books to the Law in Action*, Emily Hudson takes an important step towards filling this gap. While the empirical work concerns the operation of copyright exceptions in a particular sector - museums, galleries, libraries and archives (hereafter, ‘cultural institutions’) – and in four specific jurisdictions - Australia, Canada, the United Kingdom and the United States of America - the depth and breadth of this gargantuan study is such that meaningful conclusions can be reached about drafting copyright exceptions generally.

Drafting Copyright Exceptions is significant not only for the rigor of the qualitative empirical fieldwork, but also the way that it confidently bridges insights from empirical work with theoretical questions (the literature on standards and rules) and comparative law (the differing common law approaches to exceptions). Tying these perspectives together – theoretical, comparative and empirical – results in highly nuanced conclusions that directly address the practical question of how best to draft copyright exceptions. It also means that the book – in

demonstrating how theory (standards and rules analysis) relates to practice (qualitative empirical work) - provides a framework for future research into the operation of copyright exceptions in other contexts. Specifically, Hudson convincingly shows that a focus only on doctrinal comparative law – that is, a comparison of different legal tests such as the flexibility of a broad doctrine of fair use (characteristic of the US) or the certainty of more specific exceptions (the approach in the UK) – is simplistic; the ‘law in the books’ argues Hudson, is just ‘the tip of the iceberg’ (p.4). Instead, a systematic study of ‘what lies beneath’ the tip of the iceberg - the ‘law in action’ – takes us to more complex conclusions: ‘no particular form of drafting is inevitably superior’. Rather, how best to draft copyright exceptions ‘depends on a range of normative and practical considerations, many of which require a thorough understanding of not just the law in the books but the law in action’ (p.4 and p.27). Accordingly, beyond the specific conclusions reached about the cultural institution sector, *Drafting Copyright Exceptions* makes the case for systematic empirical work as an essential strand of intellectual property scholarship more generally.

Understanding Copyright Exceptions is structured in three parts. Part I introduces the well-known parameters of existing debates, including (in Chapter 1) arguments about the relative merits of specific exceptions or a broad fair use test (often framed as a choice between certainty or flexibility) and the international context, particularly the requirements of the three-step test contained in the Berne Convention and the agreement on Trade Related Aspects of the Intellectual Property Rights. Chapter 2 analyses the existing literature on the distinction between two different types of legal command: standards (characterised by their open-ended and general nature) and rules (that are closed-ended and detailed). Hudson argues that this literature, while stemming from the US legal realist movement of the twentieth century, has an important presence in mainstream law and economics thinking, yet has been largely absent in copyright law debates until the last two decades. Hudson’s conclusion, which then provides an

intellectual framework against which to consider her empirical work, is that ‘the best form of drafting is context dependent’ (for example, related to the frequency and variability of the behaviour to be regulated, decision-making factors such as risk aversion and reputational concerns, as well as enforcement costs and the learning costs of relevant users) and this context will vary from jurisdiction to jurisdiction: ‘there will be times when the legal response is best captured in a simple rule, instances where a multi-factor standard is preferable; and still other times when the optimal approach is a well-drafted complex rule’ (p.61 and 62).

The final chapter of Part I provides an overview of the empirical work: qualitative semi-structured interviews concerning the copyright practices of museums, galleries, libraries and archives in Australia, Canada, the United Kingdom and United States, conducted over a longitudinal period of fourteen years. Hudson identifies four possible copyright options for such institutions: (1) avoiding copyright issues altogether by using public domain material, (2) acquiring a licence or assignment of copyright, (3) relying on an exception or compulsory licence, and (4) accepting and managing the risk of infringement (p.71). While the first option, avoidance, is unrealistic in view of the long term of copyright, the second option, negotiation, is only ever a ‘partial solution’ in view of the costs and difficulties of rights clearance (p.101-102). The third option, then, exceptions and/or compulsory licences, is the most meaningful alternative to accepting the risk of infringement (option 4), and this forms the focus of the empirical work presented in Part II.

Part II, entitled ‘The Law in Action’, is divided into four chapters. First, Chapter 4 considers specific exceptions which only apply to cultural institution sectors under study. The precise nature of these exceptions vary between the four jurisdictions considered, but relate, in the main, to specific activities relating to preservation, collection administration, copying requests and onsite consultation. While a doctrinal analysis points to the uncertainty and under-inclusiveness of these exceptions, interestingly Hudson’s empirical work shows that many

institutions have developed effective working practices that ‘operationalise’ these legal provisions (p.156). Empirical work shows that institutions develop their own internal norms for interpreting these exceptions. These relate not only to ‘personal ethics and institutional norms’ but also to ‘accepted views on why we have cultural institutions, i.e., that institutions exist to take care of collection items and to preserve them and/or their contents for generations to come’ (p.157-158). Overall, empirical evidence shows that, as regards cultural institutions, complex legal rules *can* operate well in practice in relation to certain institutional activities; while revisions might be necessary (e.g. to prevent unnecessary administrative burdens) ‘the research does not suggest that their drafting style is fundamentally inappropriate for the behaviour to be regulated’ (p.158). Indeed, ‘drafting failures for specific exceptions’ can be ‘corrected by internal norms’ (p.159). Accordingly, as regards activities such as administration and preservation copying, as there are ‘strong best practice norms’, a shift to a broad fair use defence is unlikely to lead to any change; it may simply ‘reinforce the acceptability of existing practices’ (p.158). The position may be different, however, for more public-facing uses, particularly the question of on-line access, where ‘the arguments in favour of fair use are stronger’ (p.159).

Chapter 5 concerns fieldwork conducted in the US relating to the application of the general fair use exception by cultural institutions. While comfort with fair use varied amongst cultural institutions, interestingly, and contrary to the usual concerns that the breadth of the fair use tests results in uncertainty, fair use was utilised by institutions in relation to a very broad range of activities (e.g. collection management, preservation, exhibition, onsite-digital access, promotional activities, fulfilling external request and providing on-line access). In some instances, the application of fair use was influenced by ethics and institutional norms, yet there were also examples of close legal analysis. Hudson’s interviews, then, revealed that US cultural institutions were comfortable with ‘the reasoning demanded by a standard’ and case law,

elaborating aspects of fair use, forms part of that picture (p.207). Even amongst institutions where a more restrictive interpretation of fair use was employed, fair use performed an important function, in ameliorating the limitations of the specific sector exceptions and providing a ‘release valve’ as regards orphaned works (p.206).

The US case studies point to the benefits of fair use test. Yet, as Hudson shows in Chapter 6, her fieldwork suggests, at least at a first glance, a very different experience in Australia. In 2006, Australia introduced a new section 200AB into the Australian Copyright Act 1968: a bespoke exception for cultural and educational institutions which included flexible drafting ‘with the stated aim of capturing some of the benefits of fair use’ (p.87). Yet, Hudson’s empirical work shows that, despite increasing copyright law knowledge and awareness in the Australian cultural institution sector, section 200AB was invoked by cultural institutions in ‘extremely limited circumstances’; in the main it was treated as a narrow provision relating to orphaned works (p.87). However, Hudson asserts that this is explained by the particularly convoluted drafting of section 200AB, that meant it lacked comprehensibility to both users and their advisers; the lessons to be learnt from the Australian experience are rather about how we craft standards to ensure they are comprehensible, rather than cautioning against fair use.

In Chapter 7, the analysis turns to fair dealing exceptions originating in the UK Copyright Act 1911, that also applied to the British Empire. While these exceptions include a standard of ‘fairness’, they are nevertheless more particularised than ‘fair use’ by being tied to particular purposes (as originally enacted in 1911: private study, research, criticism, review or newspaper summary). Here, the focus of Hudson’s analysis is the Canadian experience, particularly the impact on the ground of the decision of the Canadian Supreme Court in *CCH v. Law Society of Upper Canada* ([2004] 1 SCR 339). The ruling in *CCH* was motivated by an ‘unambiguous desire... to adopt a more liberal approach to the interpretation of exceptions’; McLachlin CJC opined that the ‘fair dealing exception, like other exceptions... is a user’s right’ and accordingly

‘it must not be interpreted restrictively’ as a balanced approach must be struck between the rights of owners and users (p.5 Hudson, and para 48 of the *CCH* Supreme Court judgment). Yet, despite the recognition by scholars of the potential which the ruling had ‘to transform fair dealing into a fully open-ended exception in a style of fair use’, the response of cultural institutions in the first five years following the judgment, was ‘muted’; ‘awareness of the case’ amongst non-legal actors ‘was mixed and there were very few changes to procedures that were attributable to the decision’ (p.5 and p.6). The Canadian experience, then, contrasts to that in the USA (noted above) where the analysis of legal decisions by cultural institutions is one aspect of what makes ‘fair use’ a workable standard.

However, the position in Canada was to change, and that story of how ‘apparently sticky norms can change, and dramatically so’, together with later developments in the UK (stemming from the reforms in 2014, expanding the fair dealing exceptions also to include quotation, caricature, parody and pastiche, and illustration for instruction) form the main focus of Chapter 8, which opens the Final Part of *Drafting Copyright Exceptions* entitled. The analysis in Chapter 8 embodies one of the undoubted strengths of the research underpinning this book: its longitudinal nature; having shown interpretative practices to be central to understanding the law’s day-to-day application by non-legal actors at a particular point in time, Hudson also demonstrates that these practices are dynamic and capable of change over time, where the ‘right set of factors converge’ (p.298). In both the UK and Canada, institutional practices did relate to legal change, yet this was ‘not the complete story’; change was also a product changes in copyright management practices that enabled such institutions to become both more copyright confident in terms of knowledge and resources, and also to be more sophisticated in dealing with risk: ‘risk aware’ rather than ‘risk averse’ (p.297 and p.298). Most interesting is Hudson’s observation that this change in ‘internal resourcing and mindset’ also led to new copyright management norms that were ‘*independent of the prevailing legal environment*’ (p.299,

emphasis as original). For instance, a more relaxed and pragmatic attitude towards the problem of orphan works by institutions in the UK and Australia was a product of ‘a growing comfort in using risk management in decision-making about copyright’ rather than specific legal intervention (p.300). User decision-making, then, ‘can at times transcend the law in the books’ (p.301).

The final chapter draws the various strands of analysis together. Overall, the empirical work shows that whilst some cultural institution practices are ‘guided heavily by doctrinal analysis’ there were also many instances in which ‘the link between the law in books and the law in action was more tenuous’ (p.312). Copyright practices of cultural institutions are also influenced by a number of non-legal factors such as ‘views on the ethical duties and best practices of a ‘good’ institution, internal copyright arrangements (e.g. the resources devoted to copyright, and attitudes towards risk, reputation and relationship management) and historical and philosophical matters’ (p.323). More generally, ‘attitudes and practices’, as shaped by these factors, may influence the extent to which changes in the law in books are felt on the ground (p.323). Accordingly, *Drafting Copyright Exceptions* makes a forceful case of the importance, when drafting new exceptions, ‘to give full consideration not just to the policy goals of reform but the full legal and non-legal environment in which those reforms are intended to operate’ (p.323).

Drafting Copyright Exceptions is, without doubt, an important study not just for scholars and practitioners of intellectual property, but also judges, policy-makers and copyright users and their representative organisations. It provides a clear example of how systematic empirical work can not only reinvigorate but also change the parameters of longstanding legal debates and enable us to see things differently. More than this, the message that legal scholarship should also capture the operation of law in the real world, speaks to a recent shift in other areas copyright scholarship; in copyright history, Kathy Bowrey’s recent *Copyright, Creativity, Big*

Media and Cultural Value: Incorporating the Author (Routledge, 2021) casts new light on copyright's category of 'authorship' by situating it within the real-world practices of the media industry that emerged from the late nineteenth to the mid twentieth centuries. In this way, *Drafting Copyright Exceptions*, especially when placed alongside other recent copyright scholarship, puts beyond doubt the importance to lawyers of going beyond legal doctrine, also to capture the empirical reality of how copyright operates in practice.

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