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BOOK REVIEWS

Drafting Copyright Exceptions: From the Law in Books to the Law in Action. By EMILY HUDSON. [Cambridge University Press, 2020. xxv + 380 pp. Hardback £95.00 ISBN 978-1-107-04331-2.]

As copyright has risen in ubiquity as more and more of daily life takes place online, increasing attention has been paid by scholars to limitations and exceptions, or (as David Vaver was one of the first to argue that we should call them) users' rights. Following the pioneering work of Robert Burrell and Allison Coleman in *Copyright Exceptions: The Digital Impact* (Cambridge 2005), many valuable articles and book chapters have been published, such as the contributions to *Copyright Law in an Age of Limitations and Exceptions* edited by Ruth Okediji (Cambridge 2017), but there have been relatively few extended studies. Moreover, most of the work that has been published has concentrated on doctrinal aspects of the law, such as the international framework, the drafting of national exceptions or analysis of case law. A prominent feature of the debate has been the comparison between the fair use provision contained in section 107 of the US Copyright Act 1976 and the more detailed exceptions and limitations contained in legislation such as the UK Copyright, Designs and Patents Act 1988. Some have argued in favour of the perceived flexibility of the former, while others have argued in favour of the perceived certainty offered by the latter. Much ink has been spilled both by those supporting, or resisting, legislative change and by law reform bodies charged with considering such arguments.

Emily Hudson's monograph is a valuable contribution to this debate because it focusses less on "the law in books" and more on "the law in action", that is say, how exceptions and limitations are understood and applied by users. It is the product of extensive fieldwork conducted with cultural institutions (archives, galleries, libraries, museums and industry peak bodies) in four countries over 15 years in three phases: Australia in 2004–05; the US and Canada in 2007–09; and Australia, Canada and the UK in 2012–19. As the author explains, one of the advantages of this lengthy gestation period is that it revealed changes in institutions' attitudes over time as well as differences between jurisdictions.

Hudson frames her work by reference to the debate over legal standards and rules. A rule is a legal provision such as a 30 mile-per-hour speed limit, which specifies a precise legal consequence for transgressing a precise legal boundary for permitted conduct, whereas a standard is a legal criterion such as negligence, which involves the judicial evaluation of relevant circumstances in order to reach a decision as to whether conduct should be legally condemned. Rules appear to be certain, while standards appear to be flexible. Another way of expressing this is that rules tend to involve *ex ante* decision-making by legislators, while standards tend to involve *ex post* decision-making by courts. As Hudson explains, however, the differences between rules and standards are often less significant than may appear. Take the 30 mph speed limit. First, one must bear in mind the significance of the number: 30 mph does not mean 30.0 mph. Next, one must allow for the precision and accuracy of speed-measuring equipment: it may be unlikely that a speed camera can reliably distinguish between 30.4 mph (which rounds down to 30) and 30.5 (which rounds up to 31). Partly for these reasons, but also due to limits on resources, most enforcement systems will build in a margin of prosecutorial discretion, meaning that, say, no one is prosecuted unless the speed camera reading is at least 32.5

(rounded up to 33). Even then, sentencing discretion can mean that a light penalty is imposed on the driver going at 33 mph while a heavier one is imposed on the driver going at 43 mph and a still heavier one on the driver going at 53 mph. Thus rules can become standard-like in their application. Conversely, standards like negligence can become rule-like in their application as case law builds up and is analysed by commentators: patterns emerge and the application of the standard becomes more predictable owing to the basic principle of justice that the law should be uniformly applied (i.e. like cases treated alike).

Given this background, it is not surprising that Hudson's research shows that fair use and the fair dealing exceptions found in other laws are not so far apart as might be supposed, the main difference being the absence of any purpose-limitation in fair use. (Something that this reviewer can confirm from personal experience, having had occasion to judge both fair use applying US law and fair dealing applying UK law in two cases decided within nine months of each other: *Sony/ATV Music Publishing LLC v WPMC Ltd.* [2015] EWHC 1865 (Ch.) and *England and Wales Cricket Board Ltd. v Tixdaq Ltd.* [2016] EWHC 575 (Ch).) More importantly, it shows that much of the behaviour of cultural institutions depends on other factors which are not necessarily easy to transplant from one culture to another, but which can change over time.

These points are particularly well brought out by the author's comparison between the US, Australian and Canadian experiences. In the US, there is not merely a fair use provision (in addition to more specific exceptions whose role should not be overlooked), but what might be described as a culture of fair use. This is partly due to the origin of section 107 as a statutory codification of common law principles, partly due to the wider legal culture (e.g. the First Amendment), partly due to the availability of a large body of case law to provide guidance, but also due to the relative sophistication of US cultural institutions concerning copyright. In Australia, an attempt to introduce a more flexible exception in the form of section 200AB of the Copyright Act 1968 (Cth) has not been a success. This is partly due to the unfortunate drafting of this provision, which is complex and incorporates the language of the three-step test, but also due to a historically more risk-averse culture among Australian cultural institutions. This is not something that isolated court decisions in favour of users can change. Thus Hudson finds that the impact of the landmark decision of the Canadian Supreme Court in *CCH Canadian Ltd. v Law Society of Upper Canada* [2004] 1 S.C.R. 339 in the five years after the decision was handed down was "extremely muted". By contrast, a much greater change in the practices of academic libraries in Canada was prompted by Access Copyright's ill-judged attempt to impose a high per-student fee for a copyright licence, despite the still-unresolved litigation between Access Copyright and York University which is now pending before the Supreme Court. As this example demonstrates, another important factor which affects users' practices is the availability and cost of licences from copyright owners or collecting societies acting on their behalf. (At this point the reviewer should declare an interest as an author who benefits from the income generated by licences granted by the UK Authors' Licensing and Collecting Society.)

Hudson also shows that well-drafted amendments to fair dealing provisions can both support and be reinforced by changes to user attitudes. This is illustrated by the amendments to the UK 1988 Act in 2014 to introduce exceptions for quotation, for parody, caricature and pastiche and for illustration for instruction. Even though none of these exceptions has yet been tested in court (surprisingly, the quotation exception was not relied upon in the *Tixdaq* case), their introduction appears to have coincided with a shift among UK cultural institutions towards a greater

understanding of copyright, a greater willingness to invest resources in addressing copyright issues and, above all, a greater willingness to rely upon risk management. As Hudson explains, risk management involves taking a principled and ethical stance towards copyright and its application to institutions' collections and practices, and accepting a degree of risk of infringement rather than simply determining to avoid risk. At least in part, this change appears to have been driven by the problem of dealing with orphan works. None of the legislation that has been passed to deal with this issue seems to work very well, but institutions have learnt through experience that, provided appropriate care is taken, the risk of being sued is minimal. As Hudson explains, however, problems remain with the requirements of funders and insurers. (Again, the reviewer can confirm this from personal experience, albeit experience dating from prior to 2008, of advising a film production company with respect to the use for dramatic purposes of quotations from published literary works: even though it seemed likely that the copyright owner would not sue even if it could, funders were reluctant to take any risk.)

Hudson ends this impressive contribution by considering what lessons can be learnt for the drafting of copyright exceptions. Although well-disposed towards fair use because it is open-ended and therefore easier to adapt to future circumstances, she accepts that caution is required before concluding that it is a panacea. While statutory language and the way in which it is interpreted by the courts are of course important, the law in action also depends on institutional and ethical norms, copyright management techniques and the historical and philosophical context. As she concludes, what constitutes the best form of legislative drafting is a deeply empirical question, the answer to which is informed by a range of factors including the costs of promulgating the legislation, the costs for users of learning about the law, the characteristics of users (such as how risk-averse they are) and the costs of enforcement. Thus reform is not a simple matter of amending a statutory text, but depends on user engagement, which in turn depends on the legal and wider cultures.

Writing this review on 30 March 2021, one is bound to wonder what effect the COVID-19 pandemic has had, and will have, on these questions. It seems likely that users will have been forced to place greater reliance both on exceptions and limitations and on risk management. It is too soon to tell whether this will lead to a permanent change, but it is possible both that user practices will alter in ways that require legislative catch-up and, paradoxically, that they will alter in ways that make legislative reform less imperative. I await Emily Hudson's report from her next phase of fieldwork with interest.

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The Anatomy of Administrative Law. By Joanna Bell. [Oxford: Hart Publishing, 2020. xlii + 258 pp. Hardback £75.00. ISBN 978-1-50992-533-9.]

Omnia vincit amor – so wrote Virgil in the first century BCE. But the same poet also wrote that *labor omnia vicit*. Either, or both, of these propositions could be applied to Joanna Bell's excellent new book, *The Anatomy of Administrative Law*. Through hard work, and an evident love for the subject, Bell provides important insights into the nature of administrative law and sets down challenges for those who study and teach it. In short, there is no alternative to putting in the effort to understand the