



Australian Academy of the Humanities

Submission relating to 'Fair Use and Other Copyright Exceptions' Issues Paper May 2005

The Australian Academy of the Humanities (AAH) appreciates the opportunity to contribute to the current review of fair use, fair dealing, and other copyright exceptions in the digital age. We are pleased to submit this report on our views regarding copyright exception matters. We hope that the following submission will assist legislators in appreciating current academic practices for which copyright reform has an application, particularly in light of recent technological advances.

Specific views relating to numbered issues appear below. Our general view on copyright exceptions is to oppose any reduction of fair use entitlements for academic purposes. The AAH strongly supports the continuation of the fair use exception for educational purposes as well as the introduction of legitimate academic uses of copyright material that may be contestable under the current regime.

1. The Government seeks your view on the operation of the exceptions in the Copyright Act (particularly the fair dealing exceptions in ss 40-43(2) and ss103A-103C) in providing a balance between the interests of copyright owners and copyright users.

The AAH recognises that the interests of copyright owners and users both need to be accommodated in the provisions of the Copyright Act. Academics are frequently producers as well as consumers of copyright material, and so we are sensitive to the range of interests that legislation must take into account.

Additionally, it is worth noting that academic use of copyright material may often have the effect of adding value to copyright owners' benefit by refreshing broader cultural interest in their original works. In these circumstances, the rights of copyright users and owners are not in tension with each other, but may in fact augment the interests of each other.

2. The Government seeks your view on whether the Copyright Act should be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?

The AAH supports the consolidation of exceptions in the Act.

3. *The Government seeks your view on whether the Copyright Act should be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law.*

The AAH does not have a particular view on this question, although given the range of seemingly legitimate private uses of storage and recording technologies that constitute technical breaches of current statute — combined with the pace of change that will introduce as yet unimagined applications — it seems likely that the open-ended option will prove attractive.

If the open-ended option is taken, the AAH submits that the instances of fair academic use that we have provided would constitute useful examples of fair use for inclusion either in legislation or in commentary.

In the event that statutory rather than judicial regulation is adopted, however, the AAH makes several specific recommendations below for fair dealing exceptions that arise in teaching and learning, scholarship and research in the humanities. These recommendations are in respect of provisions for:

- Copying broadcast material for research purposes
- Copying and showing broadcast material for teaching purposes
- Showing pre-recorded material for teaching purposes
- Producing scholarly editions of literary works
- Copying and showing video, new media and sound for research and teaching purposes.

4. *The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for time-shifting television and radio broadcasts – including underlying works, films, sound recordings and live performances – and if so, under what conditions.*

The AAH supports the inclusion of a specific exception for time-shifting for broadcasts, including underlying works, but would extend this exception beyond television and radio to include webcasting and other temporally specific broadcasts using any technology. We would also argue that for academic applications time-shifting exceptions should allow librarying. Scholars conducting research into electronic media need to store archive copies of subject matter, in the same way researchers working on print media do, although the current copyright regime would seem to handle these two scenarios differently. Scholars working in music often need to store broadcasts of performances for similar reasons.

Academics in all disciplines increasingly rely upon television, film, radio and internet copyright material as teaching aids – television programmes on astronomy or history, for example – which would need to be archived for periodic use.

5. *The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for format-shifting, and if so, for what materials*

and under what conditions.

Humanities scholars, being primarily focused upon cultural artefacts, often need to transfer copyright material to more convenient and portable formats for effective use. Additionally, new technologies have enabled novel analytical methodologies that require platform-specific transfer: for instance, the possibilities for textual analysis using electronic copies of printed matter are easy to imagine. In a similar way, platform transfer to support new forms of analysis of sound recordings, film, new media and other formats for copyright material is also necessary for legitimate academic use.

6. *The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for making back-up copies of copyright material other than computer programs, and if so, for what materials and under what conditions.*

The AAH supports provision for making back-up copies of any copyright material for academic purposes.

7. *The Government seeks your view on whether the Copyright Act should be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances*

The AAH does not wish to express a view on aspects of the review dealing with private consumption.

8. *The Government seeks your view on whether the Copyright Act should be amended to include other specific exceptions or statutory licences, and if so, under what conditions.*

The AAH has detailed views on copyright exceptions for scholarly editions. The preparation of such works is a form of fundamental research in the humanities. Typically they require many years to compile and complete, involving the identification and detailed comparison of all textual versions of the work. The text is established, detail by detail, according to an argued criterion, typically the text intended by the author or the text available to a particular readership. A base text is chosen and emendations are made, balancing at every point the claims of the competing textual witnesses. Variant readings are listed in apparatus tables. Some scholarly editions appear in a variorum format; these editions lay out the textual evidence from the various versions and comment on them, without finalising a text.

Scholarly editions are transformative and productive for the study of the work in question. They can facilitate separate commercial exploitation by giving the underlying work a new lease of life and by providing secondary publishers with a newly established text. Typically this secondary publication appears as a general readers' or students' edition with only a fraction of the information made available in the scholarly edition.

Clearly, the secondary simplified editions, being commercial in nature, can make no claim to a copyright exemption. However, the AAH believes that scholarly editions should be exempt. Their preparation usually requires Australian Research Council or university grants; they consume many years of scholarly labour, which is often carried out with minimal or no payment; university presses alone are willing to take the risk of publishing them and usually require a substantial printing subsidy; their print runs are normally very low (around 500); they are normally very expensive; and they are purchased mainly by libraries and specialist scholars.

Given these conditions, these editions are not commercial, but are undertaken with substantial subsidies from Academies, foundations, institutions and presses. These benefactors provide these subsidies as scholarly editions constitute a valuable contribution to literary criticism and of the texts in question. The Australian Academy of the Humanities' Academy Editions of Australian Literature series is an example of this subsidised publication activity. It should be noted that scholarly editions, encumbered by the substantial apparatus required by academic standards, are not in practical competition with standard reader editions of these texts in the general market.

As things stand, such scholarship cannot be published without agreement with the copyright owner of the underlying work, which can involve negotiation about royalties or other payment. When copyright owners oppose publication — often under a mistaken view that scholarly editions make a commercial profit — these endeavours can be stopped altogether. The net result has been that works written by authors who have died within the last fifty years tend to be left aside as too fraught with practical difficulty to be worth proceeding with.

The extension of the copyright period to seventy years will obviously exacerbate this problem. Patrick White's works, for instance, some of which were published in the 1940s and 1950s, may have to wait till 2060 for their scholarly editions since White died in 1990. This sort of all-too-common situation is unacceptable, and inhibit genuine academic non-commercial work that is of benefit to the academic community and the author's legacy alike.

The AAH believes that once an author has died and the period of renewed commercial exploitation that news of the death sometimes brings about has passed (say, ten years), scholarly editions should be able to be published as specific exceptions under the Copyright Act. This should be the case whether the scholarly edition be in traditional print format, be supplemented by facsimile or other materials on a website, or be entirely electronic in form. The copyright holder would continue to benefit from normal commercial exploitation for the copyright period.

9. *The Government seeks your view on other options for implementing reform, and the costs and benefits of those options.*

The AAH does not propose any other models for implementing reform.

