

**Fair Use and Other Copyright Exceptions
Issues Paper (May 2005)**

Commonwealth Attorney General's Department

Submission of NSW Attorney General's Department

Issue 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.

Key issues

- Far from achieving 'balance' modern copyright law has been marked by the expansion of owners' rights and contraction of public entitlement
- A reasonable 'balance' between the interests of owners and users would recognise that the owner is not entitled to restrain use of copyright material that neither harms the owner's legitimate commercial expectations nor the integrity of the material
- A positive advance could be made by enlarging the scope of copyright user rights to encompass the broad variety of uses which do no actual harm to the legitimate commercial interests of copyright owners, or the integrity of the material in which their copyright subsists.

Discussion

The idea of a 'balance' between the interests of copyright owners and copyright users is misleading – it would be more accurate to refer to an imbalance. Copyright legislation was not historically designed to create parity between the interests of copyright owners and users, and aggressive delineation of copyright owner rights in the twentieth century was not 'balanced' by the enactment of countervailing provisions in favour of copyright users.

An historical account of fair use and the fair dealing exceptions illustrates that the idea of copyright legislation as a balance between the owner-user interest is a misconception. Historically, the unauthorised use of copyright material was regarded as a neutral act. If copyright use is looked at in this way, the material effect of a use becomes a crucial consideration. It is the actual or foreseeable harm to the copyright owner that determines whether the use should be censured. According to this formula, non-commercial uses of copyright material that respect the integrity of the material are permitted uses.

The origins of fair dealing lie in the old English common law of 'fair abridgement' that was to some extent mirrored in the US doctrine of fair use. The idea of fair abridgement was commensurate with a limited conception of copyright (or literary property as it was known in the eighteenth and nineteenth centuries) and developed in a string of eighteenth century cases in which the courts took a liberal view of how a person other than the author could 'abridge' a work. The courts would not restrict private as opposed to commercial uses of the work.¹

¹ *Gyles v Wilcox* 1740 2 Atk 141; *Tonson v Walker* 1752 3 Swans (App) 762; *Millar v Taylor* (1769) 98 ER 201.

US and UK copyright statutes in the nineteenth century adopted a very restricted view of infringement. For example, the *only* act proscribed by the UK's 1842 Copyright Act was 'Piracy of Books'. Any type of non-commercial use of literary property was implicitly permitted. In the nineteenth century, copyright was seen as a limited right enforceable only if an unauthorised dealing in a work caused economic harm to its owner.

US courts in the nineteenth century distinguished between the use of the *copyright* and the use of the *work*. One writer has explained this distinction in terms of purpose and function: 'copyright has [under the US Constitution] both a purpose and a function. The purpose is to promote learning; the function is to protect the author's economic interest. The function, however, must serve the purpose, not vice versa. To say that the copyright owner has a right to the profit and a right to deny public access flies in the face of the constitutional scheme of copyright ... In order to protect the author against the use of the copyright, it is not necessary to deny the consumer the use of the work.'²

In the twentieth century, the position changed, with the copyright industries lobbying successfully for the enactment of legislation that declared the hegemony of the owner over the whole field of copyright uses. Limited concessions were made to the user interest from the beginning, with the 1909 US Copyright Act codifying fair use principles and the 1911 UK Copyright Act introducing specific fair dealing provisions. The fair dealing provisions, however, were a piecemeal concession to the interests of a very limited range of users.

The new legislation did not embody a balance of rights. Referring to the contemporary position in the US, one commentator has compared fair use to a right of way across private land – a limited privilege granted as a convenience to people who would otherwise be trespassers. In this view, fair use, far from being a public benefit, indicates how much 'land' the legislature had declared off limits to the public.³

Codification of the law on fair use 'brought consumer conduct within the realm of infringement.' US copyright law as it developed only 'enlarge[d] the concept of infringement at the expense of the individual consumer's right to copy the work for the purpose of learning.'⁴

Far from achieving 'balance' modern copyright law has been marked by the expansion of owners' rights and contraction of public entitlement – in contrast to the nineteenth century position when copyright owners were, to some extent, viewed as intruders on the public domain. Literary property, held usually by publishers, was viewed in its true complexion – as a commercial asset. A person could be sued for unauthorised dealing in that property for

² L Ray Patterson 'Free Speech, Copyright and Fair Use' (1989) *Vanderbilt Law Review* 40.

³ Hannibal Travis, 'Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment' (2000) *Berkeley Technology Law Journal*, 15 (2).

⁴ Patterson, *supra*.

piracy, that is, unauthorised production of books for sale. But other non-commercial uses of a book could not be restrained.

The first legislative formulation of fair dealing principles – the 1905 Australian Copyright Act – dispensed with the nineteenth century notion that copyright infringement must involve activity directed towards commercial advantage – [i]f any person infringes any right conferred by this Act’ – but it made the important concession that ‘private use’ of a book was not an offence. In theory, it embraced a broader version of fair dealing, allowing for ‘fair extracts’ as well as specified fair dealings.

A reasonable ‘balance’ between the interests of owners and users would recognise that the owner is not entitled to restrain use of copyright material that neither harms the owner’s legitimate commercial expectations nor the integrity of the material. The justification for this approach is straightforward. The logic of copyright protection is to confer on the copyright owner control over the integrity of copyright material and its commercial exploitation – therefore any prospective use of saleable copyright material that neither offends the material’s integrity, nor undermines the owner’s commercial exploitation of the material, could prima facie be viewed as legitimate.

A glance at the *Copyright Act 1968 (Cth)* however suggests a different legislative policy. The copyright user is confronted with a barrage of copyright offences, many of them criminal - the Act devotes no less than two parts to offences (without exhausting the entirety of offences specified).

A positive advance could be made by enlarging the scope of copyright user rights to encompass the broad variety of uses which do no actual harm to the legitimate commercial interests of copyright owners, or the integrity of the material in which their copyright subsists. This formulation essentially contemplates non-commercial use (though it does not exclude non-rivalrous commercial uses) and places the onus for demonstrating harm on the copyright owner - the alleged harm must be measurable and proximate.

Issue 2 Should the Copyright Act be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?

The consolidation proposed by the CLRC is commendable. Its proposed model would introduce much-needed scope for users who do not fall within the ambit of the current exceptions to secure access to copyright material. Under the model, a considerable range of non-commercial (or non-commercially injurious) uses of copyright material (for non-derogatory purposes) might be deemed ‘fair’. This result could only assist in introducing greater equity into the copyright legislative scheme.

A possible weakness of the CLRC model is that it is too narrow. Under the CLRC model, the parameters of fair dealing are still relatively tightly drawn: the consolidated provision would still enumerate particular exceptions and the

proposed general set of factors to determine fair dealing would remain confined to 'research and study' purposes.

Because the CLRC does not explain in principle why the scope of fair dealing should be expanded, there is a danger its model would be eviscerated in the process of implementation. The range of allowable fair dealings might be increased, but any general presumption that non-commercial, non-derogatory dealings are fair would not be imported.

Issue 3 Should the Copyright Act 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?

Enactment of a fair use provision similar to section 107 of the US Copyright Law would introduce equity and flexibility into the current legislative arrangement. It would enable a broader range of copyright users to use copyright material for legitimate purposes.

It can be objected that if a provision like section 107 were adopted in Australia, the process of determining the boundaries of legitimate or fair use would introduce into the domestic copyright environment an undesirable degree of legal uncertainty. On the other hand, section 107 contains certain determinative criteria not unlike those already in section 40(2) of the Copyright Act. It is unlikely that copyright owners and users – or the courts – would be paralysed by uncertainty over what constituted fair use.

In the case of copyright material produced for a commercial purpose, the *actual* (or reasonably foreseeable) economic effect of a use should be the most powerful indicator of fairness. As argued previously, a use that does not harm the owner's commercial interest (or distort the integrity of the copyright material in question) ought to be deemed fair. As noted in the Issues Paper, US courts are willing to place on the copyright owner the onus of proving detriment alleged to be caused by non-commercial use (if the use is commercial the onus is placed on the user to demonstrate it was fair).

An 'open-ended' fair use provision would be equitable in effect, creating a presumptive licence for copyright users to use copyright material for a range of private purposes that are not commercial (or detrimental to owners' commercial interests). The seeming willingness of the US courts to require copyright owners, if the defence of fair use is raised, and the use was non-commercial, to prove economic or other harm, is an indicator of how fair use boundaries could be determined in Australia.

A fair use provision, if adopted in Australia, should state that in principle a use is fair if it does not harm the legitimate commercial interests of the owner or unreasonably distort the material in which copyright subsists. In-principle legislative guidance would assist the courts to properly consider a defence of fair use, causing them to focus on the issue of harm, not the act of infringement. Fair use cannot flourish if the context in which an unauthorised exercise of an exclusive right takes place is disregarded. If the exercise does

not adversely affect the economic interests of the owner, or distort or misrepresent the owner's copyright material, then it should be viewed as a neutral act.

This submission strongly endorses the opinions expressed in the 2004 reports of the Commonwealth Parliamentary Joint Standing Committee on Treaties (JSCOT) and the Senate Select Committee on the Free Trade Agreement between Australia and the USA (SSC). Both 'noted' the CLRC's proposal for 'the expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes ... but is not confined to those purposes.' Both made plain their view that the enhancement of rights conferred on Australian copyright owners by the Australia-US Free Trade Agreement ought to be counterbalanced by provisions in the Copyright Act protecting the user interest. The JSCOT, explicitly, and the SSC, indirectly, favoured enactment of a fair use provision.

Issues 4-6

Exceptions for time and format shifting, and the making of back-up copies of copyright material other than computer programs, are consistent with the suggested policy towards fair use discussed earlier. This submission expresses no view as to whether these exceptions should be specified (or assumed to be captured by the language of a general 'open-ended' provision).

Issue 7 Should the Copyright Act be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances?

This submission strongly opposes the introduction of a licence for private copying. The proposal, if implemented, would only further entrench the conceptual bias in the Copyright Act towards the interests of copyright owners, to the further detriment of the so-called copyright balance. The proposal is inconsistent with the principle – clearly adducible from copyright history – that unauthorised use of copyright material is a neutral act. It would undermine the idea of a private (or public) domain. It would reinforce the proposition propounded by copyright owner interests that every use of copyright material is remunerable – even if the use has no economic consequences. For these reasons, the proposal should be regarded, from the policy perspective, as undesirable.

Issue 8 Should the Copyright Act be amended to include other specific exceptions or statutory licences, and if so, under what conditions.

As discussed, this submission considers that an in-principle statement of the user entitlement, in an open-ended fair use provision, represents the most flexible and socially beneficial way to protect the copyright user interest. However, enlarging the number of specific exceptions set out in the Copyright Act is also an attractive option.

In this respect, it should be noted that Article 5(3) of the EU Information Society Directive states that Member States may choose to provide exceptions or limitations for 'certain Governmental, judicial, ceremonial and public security purposes'. It is submitted that the logic of permitting private uses of copyright material in specified circumstances applies also to certain government uses of copyright material – if the test of harm is applied, then it can be argued that certain unauthorised government uses that do not injure the commercial interests of copyright owners (or distort the copyright material) should be regarded as non-remunerable.

The statutory licence scheme for government copying of print and broadcast copying has proved inefficient and difficult to administer, providing little certainty that the volume of alleged copying and the type of copying is accurately determined.

It is submitted that where possible, statutory schemes should be avoided for the reasons outlined. In practice, it is questionable whether they resolve the problem of efficiently collecting remuneration for a diffuse group of copyright owners, or avoid imposing unreasonable detriment on the copyright users from whom remuneration is collected.

Issues 9 and 10

See earlier comments.