

6 July 2018

The Director
Copyright Law Section
Department of Communications and the Arts
GPO Box 2154
CANBERRA ACT 2601

By email: copyright.consultation@communications.gov.au

Dear Sir/Madam

Copyright Modernisation Discussion Paper

The Intellectual Property Committee of the Law Council of Australia's Business Law Section (**IPC**) is pleased to make this submission in response to the *Copyright Modernisation discussion paper (Discussion Paper)*.

In summary, the IPC supports:

1. Introducing a broad "fair use" defence;
2. If, despite every major review since at least the Copyright Law Review Committee's Simplification Reference recommending the introduction of a broad "fair use" defence, the Government does not adopt this recommendation, the IPC would be prepared to support the introduction of a number of additional fair dealing defences despite the obvious shortcomings with that approach;
3. Limiting contracting out of the fair use defence or, if fair dealing is retained, the fair dealing defences only to circumstances where the right holder establishes that the exclusion of the defence was reasonable in the circumstances; and
4. Limiting the remedies available for use of orphan works after a reasonably diligent search has failed to identify the relevant author/copyright holder to a reasonable royalty/fee.

Fair use or Fair dealing

The IPC supports the introduction of a broad "fair use" defence as proposed by the Australian Law Reform Commission (**ALRC**) in its *Copyright and the Digital Economy Report*, essentially for the reasons identified by the ALRC.

First, despite some comments in the Discussion Paper, it is important to note that "fair use" is not an American invention. The approach of fair use, if not the term itself, developed and was applied by the English courts in assessing whether there was an infringement prior to

the first statutory expression of a limited number of fair dealing defences in the *Copyright Act 1911* (Imp.).¹

In addition, Australia's first copyright act, the *Copyright Act 1905* (Cth), included in s 28 a wide- ranging defence in the following terms:

"28. Copyright in a book shall not be infringed by a person making an abridgment or translation of the book for his private use (unless he uses it publicly or allows it to be used publicly by some other person), or by a person making fair extracts from or otherwise fairly dealing with the contents of the book for the purpose of a new work, or for the purposes of criticism, review, or refutation, or in the ordinary course of reporting scientific information."

While s 28 did not use the term "fair use", it did permit the making of "*fair extracts or otherwise fairly dealing with the contents of the book for the purpose of a new work*".

Even when the specific fair dealing defences were embodied in the 1911 Act, Parliament still intended and expected that the courts would continue to apply the broadly-based approach previously adopted at common law. It was only later that the English (and subsequently Australian) courts adopted the narrow, legalistic approach to interpreting the specific defences that so bedevils the operation of defences to copyright infringement that we now find ourselves in.

²The history of copyright amendments in Australia amply demonstrates the basic unsuitability and inadequacy of the approach of legislating specific and limited fair dealing defences.

First, the introduction of amendments to meet demonstrated needs and changing circumstances takes far too long. It lags behind the need not just by years but often decades. Figure 3 on page 10 of the Discussion Paper demonstrates this problem amply. The IPC also attaches as Annexure A a slide comparing and contrasting the recognition of some non-infringing uses under American law (through fair use) and the introduction of specific defences into the *Copyright Act 1968* (Cth). For example, a defence for time shifting free to air television broadcasts (other than for unprotected programs like live sporting events) took over 20 years to be recognised in our law despite its recognition in the USA in 1984³ with almost every Australian household engaging in that infringing practice from at least the 1970s. In addition, it has been necessary to introduce numerous other defences such as provisions relating to the copyright in chemical labels (s 44B in 1994), medical products and information (s 44BA in 2011 and s 44BB in 2015). Furthermore, as the ALRC noted, there are, as yet no defences applicable to what are now common or everyday uses such as Google search results.

Secondly, even where a specific defence has been enacted, it has generally proved too tied to technological conditions and understandings at the time of its enactment. For example, even though it was introduced only in 2006, the format-shifting provisions apply only to broadcasts and not other types of transmission such as Internet streaming. Section 109A introduced in 2006 to legitimise the widespread making of copies of recorded music on devices like iPods, needed to be amended in 2010.

¹ See e.g. Burrell and Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005) 253 – 264.

² Ibid.

³ *Sony Corp. of Am. v. Universal City Studios* 464 U.S. 417 (1984).

In addition, the wording of the provisions often severely limits their practical utility. For example, the reverse engineering or analysis exceptions relating to computer programs are extremely technical in their wording. A failure to comply precisely with the strict legislated wording means the defence is unavailable. Accordingly, the Courts have held that a developer cannot rely on these defences to develop a program to convert a database in one format to the developer's own format *unless* a customer requests the conversion exercise in advance.⁴

Given the interpretative approach adopted by Australian courts,⁵ the IPC considers it is simply not possible to draft specific exceptions in a form which is sufficiently comprehensive to deal with these types of issues, clear enough to be sufficiently intelligible in day to day use and sufficiently flexible to deal with rapidly changing technological developments.

Experience has shown, however, that given sufficiently general provisions, such as s 18 of the Australian Consumer Law (formerly s 52 of the *Trade Practices Act 1974*), that the courts are well able to apply the provision across wide ranges of differing circumstances consistently with its intended objective

Thirdly, the inadequacy and unsuitability of the present approach has been amply demonstrated.

As we have already mentioned, every significant review of the *Copyright Act 1968* (Cth) since at least the Copyright Law Review Committee's *Simplification Reference* in 1998 has recognised the need for reform and recommended adoption of a general fair use defence.

Given the exhaustive consideration this issue has received from independent expert bodies, the IPC submits that the case for a general fair use has been made. The onus is on opponents of such reform to provide new information sufficient to justify ignoring or qualifying these repeated recommendations.

Moreover, in finding that Men at Work's "*Down Under*" infringed copyright in "*Kookaburra sits in the old gum tree*", Justice Emmett remarked:⁶

"If, as I have concluded, the relevant versions of Down Under involve an infringement of copyright, many years after the death of Ms Sinclair, and enforceable at the behest of an assignee, then some of the underlying concepts of modern copyright may require rethinking. While there are good policy reasons for encouraging the intellectual and artistic effort that produces literary, artistic and musical works, by rewarding the author or composer with some form of monopoly in relation to his or her work (see Ice TV at [24]),

.... Nevertheless, one may wonder whether the framers of the Statute of Anne and its descendants would have regarded the taking of the melody of Kookaburra in the Impugned Recordings as infringement, rather than as a fair use that did not in any way detract from the benefit given to Ms Sinclair for her intellectual effort in producing Kookaburra."

⁴ See e.g. *CA Inc v ISI Pty Ltd* [2012] FCA 35 at [342] – [344] (Bennett J).

⁵ Contrast the approach of the Canadian Supreme Court in cases such as *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339.

⁶ *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* [2011] FCAFC 47; 191 FCR 444 at [100] – [101].

Fairness factors

The IPC supports the inclusion of the fairness factors listed on page 11 of the Discussion Paper (the fairness factors already specified for s 40) as a non-exhaustive list of considerations to be taken into account.

Additional illustrative purposes

Subject to four comments below, the IPC supports inclusion of the illustrative purposes set out on p. 11 of the Discussion Paper.

First, considerable care needs to be exercised with “certain government uses”. Chapter 15 of the ALRC’s *Copyright and the Digital Economy* report identified a range of “governmental” uses which are highly likely to satisfy the “fairness” test almost always and therefore should be stipulated as blanket defences to avoid dispute, given the unsuccessful experience of licence negotiations recounted by the ALRC.

As the Discussion Paper reports, the existence of a broad fair use defence in its copyright legislation has not precluded the United States including a significant number of specific defences and licences. The IPC supports the inclusion in the Act (to the extent it is not already the case) of the express “blanket” defences identified by the ALRC in relation to “governmental” activities.

As part of those defences, the IPC submits that the existing defences provided by ss 43(1) and 104 relating to judicial proceedings be retained. It is important for the administration of justice that Courts and tribunals are able to act on all relevant materials without constraint. And, as the IPC submitted to the ALRC, we are aware that allegations of copyright infringement have been made in connection with the use of materials in court proceedings in the United States.

On the other hand, there are also a wide range of uses by government under the Crown use provisions. Many of those uses require paid remuneration and are not appropriate for royalty free use. The IPC submits there should not be any change to those arrangements.

Having regard to those matters, it is not clear to the IPC that specific mention of “government use” needs to be, or should be, included in the list of illustrative purposes.

Secondly, in its response to the ALRC’s discussion paper on *Copyright and the Digital Economy*, the IPC expressed concern that the development of text and data mining was new and little understood. This would suggest that the treatment of text and data mining issues needs to be explored on a case by case basis and privileging it over and above other uses by listing it as an identified purpose may be premature.

The IPC supports the inclusion of educational use in the list of illustrative purposes to ensure that educational institutions can take advantage of the flexibilities offered by emerging technologies. However, the multiple copying of copyright materials through the (largely former) provision of photocopied course packs and digital equivalents can have a significant economic impact on publishing.

Parliament has long recognised this through the provision of statutory licence schemes (formerly Part VB, now ss113N and following).

The IPC has not supported the repeal of such arrangements. It is also important that their existence in the Act be recognised as a significant [essential?] consideration in any assessment of whether or not any particular use is “fair”.⁷

Fourth, whether it may be desirable to include additional or other illustrative purposes may be affected by whether or not some existing provisions (e.g. Part III, Division 4A relating to non-infringing acts relating to computer programs) are retained or repealed.

In considering this issue, it will be important to take into account the desirability of avoiding over-complication. In addition, the IPC considers it would be important to make it clear that the repeal of particular defences considered to have been subsumed in a fair use defence was not intended to convert into infringement what is currently not infringing.

The IPC also draws attention to the key proposition derived from *Campbell v Acuff-Rose* by the ALRC at paragraph 4.9 of its Discussion Paper on Copyright and the Digital Economy:

“just because a use falls into one of the categories of illustrative purpose, does not mean that such a use will necessarily be fair. It does not even create a presumption that the use is fair. In every case, the fairness factors must be ‘explored, and the results weighed together, in light of the purposes of copyright’.”

New fair dealing defences

The IPC would be prepared to support the introduction of a number of additional fair dealing defences despite the obvious shortcomings with this approach if fair use is not enacted and subject to the comments made above about additional illustrative purposes.

The IPC notes, however, that this piecemeal approach is a very poor alternative which is likely to lead to much greater uncertainty and expense from the need to identify a particular category or pigeon hole in which to fit a contested use and argument over whether the use meets the criteria for that category. Further, as the *Panel* case⁸ shows, the need to consider multiple, overlapping defences can lead to considerable duplication of effort and confusion which is neither desirable nor cost-effective.

Ministerial regulation making power

The IPC considers that conferring a regulation making power on the Minister to introduce new exceptions from time to time is not a suitable approach.

First, there will be considerable uncertainty about whether circumstances have arisen sufficient to cause the Minister to consider introducing a new defence.

Secondly, the introduction of specific limited defences will be subject to the same problems of narrow and restricted interpretation already referred to.

Provisions that could be repealed

In its *Copyright and the Digital Agenda* report, the ALRC identified a number of provisions which could be repealed if a general fair use defence were enacted. The IPC supports those proposals.

⁷ CAL v Haines (1982) 40 ALR 264 at 272 and 43 ALR 549 at 556.

⁸ TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2001) 108 FCR 235 and, on appeal, (2002) 118 FCR 417.

As noted above, the IPC supports implementation of the ARLC's recommendations 15-1 to 15.5 and notes the ALRC's comments at paragraphs 17.33 to 13.37.

In addition, the IPC considers it would be important to make it clear that the repeal of particular defences considered to have been subsumed in a fair use defence was not intended to convert into infringement what is currently not infringing.

Contracting out

As with the question of the need for flexible exceptions, the IPC notes that multiple reviews have recommended that contracts which seek to remove the ability of users to rely on copyright exceptions should be prohibited in at least some circumstances.⁹ These bodies considered that copyright exceptions are an important means by which copyright rights are limited in the public interest, and that contract ought not to be able to override or undermine the public interest limits imposed by the Copyright Act:¹⁰

1. The Copyright Law Review Committee (**CLRC**) recommended in 2002 that an agreement or provision of an agreement that excludes or modifies the effect of certain copyright exceptions has no effect. Exceptions included in the recommendation were the fair dealing exceptions, exceptions for technical/incidental copying, and certain library and archive exceptions.
2. The ALRC recommended that contractual terms restricting or preventing acts otherwise permitted by the libraries and archives exceptions should be unenforceable. It also recommended that if fair use were adopted, contracting out should not be prohibited, because arguably freedom of contract is more important in a market-oriented, fair use environment. The ALRC was concerned about unintended effects. On the other hand, the ALRC recommended that if exceptions were left confined to specific uses, and an extended fair dealing exception were adopted, limits on contracting out *should* apply. This recommendation would (in the event of extended fair dealing being adopted) have prevented contracting out of the existing fair dealing exceptions, as well as fair dealing for quotation, non-commercial private use, incidental or technical use, educational use, library or archive use, and access for people with a disability.
3. The Productivity Commission recommended that contract arrangements should not be able to override the limited protections offered by copyright exceptions.

The IPC notes that the Commonwealth Government response to the Productivity Commission Report supported this recommendation in principle.

⁹ In addition to the Australian reviews listed in text, the IPC notes that the Hargreaves Report 2011 in the UK also recommended that new exceptions introduced into UK law should not be capable of being set aside by contract: Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (Department for Business, Innovation & Skills 2011), 51.

¹⁰ A question considered in various of these reviews has been whether it is necessary to address problematic contractual provisions through the *Copyright Act 1968*, or whether, on the other hand, it is sufficient to rely on other general law provisions such as unfair contractual terms legislation, consumer protection law, and competition law. This issue was considered in some detail – and answered in the negative – in a research report produced for the UK's Strategic Advisory Board on IP (SABIP): M Kretschmer et al, *The relationship between copyright and contract law* (2010).

The goal of the various independent bodies who have recommended a prohibition on “contracting out” of copyright exceptions is clear: the public interests articulated to, and core to, the copyright system ought not to be simply overridden by contracts. Another concern articulated in the various reports is that in many cases, and especially in the digital environment, copyright licences are presented to users on a “take it or leave it” basis: i.e. they come in the form of mass-market non-negotiated contracts, rather than representing a negotiated outcome that reflects the interests of all parties to the contract. There may be less concern about the content of contracts that result from negotiations between significant, experienced copyright production and use interests.

The IPC recognises the evidence of widespread conduct apparently undermining the policy objectives of the existing fair dealing and library defences uncovered by inquiries such as the CLRC’s *Copyright and Contract* inquiry. The IPC is concerned, however, that a blanket prohibition on contracting out of certain copyright exceptions would unduly restrict parties’ freedom of contract. It should not be presumed that an agreement to contract out of a copyright exception is always unfair or contrary to the public interest, even if that exception has a clear public purpose. For example, an author provides his or her novel to a book reviewer, for the purpose of writing a review. However, a term of their agreement is that the review must not be published until 3 months later, when the novel is publicly released. This is a fair and reasonable contractual term that limits the fair dealing exception for criticism and review.

The position of sophisticated parties engaging in mutual negotiations is not the same as situations where contractual terms are presented on a “take it or leave it” basis.

The IPC recognises that it is important to protect exceptions with copyright purposes, but acknowledges that, in some circumstances, it is fair and reasonable to contract out of these exceptions so not contrary to the public interests protected by copyright. The IPC submits that the question should be whether a term of an agreement that purports to exclude or limit the operation of the relevant copyright exception is fair and reasonable in all of the circumstances. In this way, both freedom of contract and the public interests protected by copyright are protected.

The IPC submits, therefore, that a term of a contract is void if (a) the term prevents a person from doing an act falling which constitutes fair use or, if fair dealing be retained, is within one of the nominated exceptions; and (b) the term is unreasonable. The person seeking to enforce the term should bear the onus of showing it is not unreasonable. In assessing whether the term is unreasonable, the Court should have regard to:

- (b) the public policy objectives served by the defence;
- (c) whether a right or licence to use the copyright material in question is available which is not subject to the prohibition;
- (d) the extent, if any, to which the parties had a genuine opportunity to negotiate the terms of the contract including whether or not the prohibition was included;
- (e) the benefits provided under the contract over and above those that would be available if fair use (or fair dealing) could be exercised;
- (f) any other relevant matters.

The ALRC's proposal was that the provision would apply only to certain **fair dealing** exceptions. The IPC does not support that approach. It will lead to the strong inference that defences which are not protected by a prohibition on contracting out serve less important public policy objectives and so may be more easily overridden. It will result in the creation of a two-tiered system of fair dealings inconsistent with the policy reasons leading to adoption of the defence in the Act.

Another option mentioned in the consultation paper would be provisions more along the lines of the National Employment Standards¹¹ and residential tenancy conditions.¹² We acknowledge that these provisions provide obvious precedents for the idea that certain public interest provisions cannot be overridden by private contract – to that extent, these examples strengthen the argument in favour of similar provisions in copyright. We would however argue against any attempt to articulate a pre-defined set of contracts where contracting out will be prohibited. We do not think that it is possible, in advance, to articulate an exclusive list of those contracts where concerns about the undermining of the public interest in copyright are likely to arise, simply owing to the large number and enormously varying circumstances in which copyright issues arise. It is not the case, for example, that concerns only arise where contracts are non-negotiated mass market contracts.

Orphan works

The IPC does not think that the treatment of “orphan works” can or should be dealt with only as an aspect of “fair use”. Rather, it needs to be dealt with separately and expressly. This is partly because the IPC is unaware of “fair use” being successfully invoked to protect use of copyright material just because of its status as an orphan. Further, it appears to the IPC that a risk/benefit analysis may well deter many organisations which may wish to use some orphan work or works from incurring the risks and expense that could be involved in defending an infringement allegation on the basis of fair use.

The IPC considers that Option 2, limitation of remedies, is the appropriate approach. Under this approach the remedy available to a copyright holder which emerges after the user has been unable to ascertain it following a reasonably diligent search is limitation to payment of a reasonable royalty or licence fee. An injunction should be available only if the user fails or refuses to pay the reasonable royalty as agreed or, in default of agreement, determined by an appropriate tribunal.

It may be that the parties could agree to submit determination of disputes about reasonable compensation to the Copyright Tribunal. Otherwise, it would seem necessary for the determination to be made either by the Federal Court or the Federal Circuit Court given the separation of powers issues.

The IPC does not support the adoption of Option 1 or Option 3. Apart from anything else, the concept of “non-commercial use” in this context is very vague and uncertain. It is presumably envisaged that something like including the material in a video display in the (presumably not-for-profit) cultural institution is “non-commercial”. What happens if the institution in question charges an entry fee? Further, what happens if the institution in addition to that display makes reproductions available for purchase as souvenirs or, in the

¹¹ Terms in awards, registered agreements and employment contracts can't exclude or provide for an entitlement less than the National Employment Standards, and those that do have no effect. See Fair Work Ombudsman (2017), [Introduction to the National Employment Standards](#).

¹² [Section 219](#) of the *Residential Tenancies Act 2010* (NSW) prohibits contracting out of that Act (whether purporting to exclude, limit or modify the operation of this Act or the regulations or having the effect of excluding, limiting or modifying the operation of this Act or the regulations). Any such term will be considered void

case of a public broadcaster, licenses for a fee the right to broadcast the material to another (potentially overseas) broadcaster?

Instead of one or more special exceptions for such uses, the IPC considers that the fee(s) charged for the use (if a copyright holder does emerge after the event) should be set at a level appropriate to the nature of the use(s) in question.

Should you require further information in the first instance please contact John Collins Chair of the IPC (icollins@claytonutz.com or 02 9353 4119).

Yours sincerely

A handwritten signature in black ink, appearing to read 'RMS', is positioned below the text 'Yours sincerely'.

Rebecca Maslen-Stannage
Chair, Business Law Section