

6. The New Fair Dealing Exception

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Summary

6.1 This chapter considers an alternative to an open-ended fair use exception, namely, a ‘new fair dealing exception’ that consolidates the existing fair dealing exceptions in the *Copyright Act* and introduces new purposes. The ALRC recommends that this fair dealing exception be introduced, if fair use is not enacted.

6.2 This exception is similar to fair use, but it is confined to certain prescribed purposes. The purposes listed in the fair use exception are illustrative—examples of types of use that may be fair. The purposes listed in the new fair dealing exception, on the other hand, confine the exception. This exception will only apply when a given use is made for one of the prescribed purposes.

6.3 Like fair use, a confined fair dealing exception is more flexible and adaptive than detailed, prescribed exceptions. It requires certain factors to be considered in an assessment of fairness. This flexibility is necessary to allow for innovative and productive uses of copyright material in a digital age.

6.4 Fair dealing also asks the right questions of a given use of copyright material. It promotes socially beneficial and transformative uses, and disfavors uses that unfairly harm the markets of creators and other rights holders. In this way, fair dealing encourages and rewards the creation of new copyright material.

6.5 Fair dealing shares many of the benefits of fair use. The benefits of the specific fairness factors are discussed in Chapter 4. The merits of the specific prescribed purposes, such as educational use, are discussed in separate chapters concerning those types of use.

The new consolidated fair dealing exception

6.6 In the Discussion Paper, the ALRC proposed that if fair use were not enacted, a number of new fair dealing exceptions should be introduced into the *Copyright Act*. The ALRC also proposed that the fairness factors be included in each fair dealing exception. Another, simpler, way of achieving this outcome is to consolidate the existing fair dealing exceptions into one provision, and introduce new purposes. This would be a closed-ended fairness exception, confined to uses of copyright material for the following purposes:

- (a) research or study (existing);
- (b) criticism or review (existing);
- (c) parody or satire (existing);
- (d) reporting news (existing);
- (e) professional advice (existing);
- (f) quotation (new);
- (g) non-commercial private use (new);
- (h) incidental or technical use (new);
- (i) library or archive use (new);
- (j) education (new); and
- (k) access for people with disability (new).

6.7 These are the same as the illustrative purposes listed in the fair use exception recommended in Chapter 4.

Differences between new fair dealing and fair use

6.8 What is the difference between fair use and this new fair dealing exception? Under fair use, the list of purposes, or types of use, is merely illustrative. The fact that a particular use is not for one of the illustrative purposes does not mean that the use cannot be found to be fair. Fair use essentially asks one question: Is this use fair, considering the fairness factors?

6.9 The new fair dealing exception, on the other hand, can only apply to a use of copyright material if the use is for one of the prescribed purposes. If a given use does not fall into one of the categories of use, then it cannot be found to be fair. This confined fair dealing exception asks two questions: 1. Is this use for one of the listed purposes? 2. If so, is this use fair, considering the fairness factors? The exception only applies if the answer to both questions is 'Yes'. Therefore the new fair dealing exception is a narrower defence to infringement than fair use.

6.10 Although confined to prescribed purposes, this new fair dealing exception also expands the range of purposes currently provided for in the existing fair dealing exceptions in the *Copyright Act*.

6.11 The word ‘use’ in ‘fair use’ is intended to have the same meaning as ‘dealing’ in ‘fair dealing’. No difference comes from the fact that one exception uses the word ‘use’ and the other ‘dealing’.

6.12 In discussing the meaning of the word ‘dealing’ in the existing fair dealing exceptions, Professor Sam Ricketson argues that it does not refer only to the making of reproductions, but that rather, it was

reasonable to regard a dealing with a work for the purposes of ss 40–43 as extending to the doing of any act which falls within the scope of the copyright owner’s rights, ie not only the making of reproductions, but also the public performance, communication to the public, adaptation or even publication of a work.¹

6.13 This Report refers to ‘fair dealing’ because this is the expression used in the *Copyright Act* and because it is most commonly associated with fairness exceptions confined to prescribed purposes.

Common benefits

6.14 Many of the benefits of fair use would also apply to a confined fair dealing exception. They are both flexible standards, rather than prescriptive rules. They both call for an assessment of the fairness of particular uses of copyright material. In assessing fairness, they both require the same fairness factors to be considered, and therefore they both ask the same important questions of any given unlicensed use, when deciding whether it infringes copyright.

6.15 Both exceptions encourage the use of copyright material for socially useful purposes, such as criticism and reporting the news; they both promote transformative or productive uses; and both exceptions discourage unlicensed uses that unfairly harm and usurp the markets of rights holders.

6.16 Fair use and fair dealing are also more flexible and adaptive to new technologies and services than detailed, prescriptive exceptions, such as the time shifting exception. An exception for fair dealing for non-commercial private use, for example, would not need to be amended to account for the fact that consumers now use tablets and store purchased copies of copyright material in personal digital lockers in the cloud.

6.17 Parliament does not need to predict or approve new technologies and services that use copyright material. Instead, the Australian Parliament can enact one exception based on principles that can be used to evaluate whether almost any unlicensed use infringes copyright.

Advantages of fair use over fair dealing

6.18 This Report recommends the introduction of a fair use exception, which has a number of advantages over a confined fair dealing exception.

¹ Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* [11.20].

6.19 Despite the many benefits common to both fair use and fair dealing, a confined fair dealing exception will be less flexible and less suited to the digital age than an open-ended fair use exception. Importantly, with a confined fair dealing exception, many uses that may well be fair will continue to infringe copyright, because the use does not fall into one of the listed categories of use. For such uses, the question of fairness is never asked.

6.20 Some submissions stressed that, while an improvement on the current law, the alternative fair dealing exceptions are very much a second-best option and that fair use was preferred. Universities Australia submitted that fair use properly focuses on whether or not a given use is fair and would ‘greatly reduce the uncertainty that has resulted from having to pigeonhole a particular use into one of the purposes’ in the existing fair dealing exceptions.²

6.21 The Law Council of Australia broadly supported some alternative fair dealing exceptions, if fair use were not enacted, but it warned 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.³

6.22 It can also be argued that the new fair dealing exception is more certain than fair use, because it is clear that any use not for one of the listed purposes, cannot be found to be fair. However, those who prefer an adaptive, flexible approach to copyright exceptions will agree with the copyright academics who submitted that:

Australia’s current system of exceptions only provides ‘certainty’ in the sense that we can be confident that a whole raft of socially desirable re-uses of copyright material are prohibited.⁴

6.23 The ALRC agrees with some of these criticisms of confined exceptions, and prefers the open-ended fair use exception. However, in response to stakeholder feedback the ALRC is recommending an alternative in the event that fair use is not enacted. This alternative builds upon the existing fair dealing regime and may even prepare the way for fair use at a later time.

6.24 Although fair dealing is necessarily narrower than fair use, the scope of the purposes in the new fair dealing exception need not be given a narrow construction. Rather, they should be given a wide construction. In considering the UK’s fair dealing exception for criticism or review, Lord Justice Walker stated:

‘Criticism or review’ and ‘reporting current events’ are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries is doomed to failure. They are expressions which should be interpreted liberally ... However it can be said that the nearer that any particular derivative use of copyright material comes to the

2 Universities Australia, *Submission 754*.

3 Intellectual Property Committee, Law Council of Australia, *Submission 765*. See also

4 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

boundaries, unplotted though they are, the less likely it is to make good the fair dealing defence.⁵

6.25 Many of the other purposes listed in the new fair dealing exception recommended in this Report also have a wide and indefinite scope. The ALRC considers they should also be interpreted liberally, so that the focus can be on whether a given use is fair, rather than on whether a given use falls into one of the prescribed categories of purpose.

6.26 If a particular use is only on the margins of one of the purposes, then it may be less likely to be fair. This would seem to be true when applying both fair use and fair dealing, though the question will be more important when applying fair dealing.

6.27 Fair dealing could be made more like fair use by adding additional uses to the list of purposes in the new fair dealing exception, and by drafting the purposes more broadly. A confined fair dealing exception with many broad categories of permitted purpose would be more like fair use than the same exception with only a few narrow categories of permitted use. The more purposes that are listed in a fair dealing exception, the more similar it will be to fair use.

6.28 However, the new fair dealing exception is recommended in this Report as an *alternative* to fair use—the two exceptions cannot be the same. The ALRC does not list in the new fair dealing provision every type of use that it believes should be considered under a fairness exception. However, if fair dealing is enacted instead of fair use, then consideration might be given to including ‘back-up and data recovery’ and ‘interoperability, error correction and security testing’⁶ in the fair dealing exception.

Fairness factors

6.29 The ALRC recommends that the new fair dealing exception should explicitly state that the fairness factors must be considered when determining whether a given use is fair. These are the same fairness factors that the ALRC recommends should appear in the fair use exception.⁷ The factors are:

- (1) the purpose and character of the use;
- (2) the nature of the copyright material;
- (3) the amount and substantiality of the part used; and
- (4) the effect of the use upon the potential market for, or value of, the copyright material.

5 *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605.

6 This was recommended by R Xavier, *Submission 531*. See Ch 17.

7 See Ch 5.

6.30 Currently, only the fair dealing exceptions for research or study explicitly include fairness factors. However, it is likely that these same factors should, as a question of law, also be considered when applying the other fair dealing exceptions.⁸

6.31 Some have suggested that courts have on occasion given insufficient regard to the fairness factors, when applying Australia's fair dealing exceptions.⁹ Including the factors in the new fair dealing exception should ensure that the factors are considered in future cases. This should not affect the scope of the existing fair dealing exceptions, because they already impliedly require the fairness factors to be considered.

6.32 Robert Xavier considered there may be a problem with requiring the fairness factors to be considered when applying fair dealing exceptions:

in fair use the presence of any of the fair dealing purposes would weigh the first factor in favour of fairness. In the proposed fair dealing exceptions, it seems that the fairness factors could only be considered once the purpose of the dealing had already been identified as one of the specified purposes—suggesting either that the first factor must always weigh in favour of fairness (making it somewhat superfluous, so I'm not sure a court would accept this interpretation), or that it might sometimes weigh against fairness even if the threshold test of purpose had already been passed.¹⁰

6.33 In the ALRC's view, the function of, and relationship between, the first fairness factor and the listed purposes should be the same, under both fair use and fair dealing. William Patry has written that the role of the preamble to the US fair use provision, which contains the illustrative purposes, 'may best be understood by appreciating the preamble in relation to the first factor, the purpose and character of the use'.¹¹ In this respect, Patry writes that:

while the preamble directs the courts to determine whether the use is of a *type* potentially qualifying as a fair use, the first factor directs the courts to examine whether the particular use made of copyrighted material was necessary to the asserted purpose of criticism, comment, etc. [ie, one of the illustrative purposes] or instead, whether defendant's purpose could have been accomplished by taking unprotectable material such as facts, ideas, or less expression. ... Courts must therefore look not only at the justification for defendant's work as a whole (as the preamble directs) but also at the justification for each use within the whole (as the first factor directs).¹²

6.34 Patry then quotes Judge Pierre Leval on this matter:

In analysing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the

8 See Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.09]. Later, at [6.36] the Copyright Law Review Committee referred to comments to similar effect made by Professors Ricketson and Lahore in each of their loose-leaf services.

9 For example, M Handler and D Rolph, "'A Real Pea Souper': *The Panel Case* and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' (2003) 27 *Melbourne University Law Review* 381.

10 R Xavier, *Submission 816*.

11 W Patry, *Patry on Fair Use* (2012), 84.

12 *Ibid.*, 90.

justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.¹³

6.35 The new fair dealing exception should be approached in this same way. The first step would be to consider whether the use in question comes within one of the listed purposes. This would be to test whether justification exists. The second step would be to consider whether the use was fair, having regard to the fairness factors. Even if justification exists, the first factor may not necessarily favour a finding of fairness, for example because the particular use in question was not at all transformative.

6.36 For example, photocopying an entire textbook for 30 students in a university class may be an educational use and so pass the first step in the new fair dealing exception. But because the use is not transformative, and because the university harmed the publisher's market by not buying additional copies of the textbook, the use would be unfair and would not pass the second step. In this example, when considering the first fairness factor, the court may note that the use was for education, favouring a finding of fair dealing, but this would be unpersuasive, considering the photocopies are not transformative and act as an unfair substitute for the original textbook.

Objections to fair use

6.37 Despite the many advantages of fair use over a confined fair dealing exception, the Australian Government may prefer to enact the new fair dealing exception. Arguments could include that fair dealing may appear to be more consistent with the three-step test. Another relevant consideration may be the unpopularity of fair use among many rights holders.

6.38 Some stakeholders have argued that fair use is not consistent with international law, in particular the three-step test in the *Berne Convention*.¹⁴ In the ALRC's view, fair use is consistent with the three-step test.¹⁵ The ALRC's view is shared by a group of 50 academics—including many leading international and Australian intellectual property lawyers and academics. This is evidently also the view of Israel, the Republic of Korea, the Philippines, and the United States.¹⁶ However, the argument that the new fair dealing exception is consistent with the three-step test may be even stronger, because it is explicitly confined to certain 'special cases'—the listed purposes.

6.39 Another reason the Australian Government may prefer to enact a confined fair dealing exception is the widespread, and often strong, objections among rights holders to introducing fair use in Australia. On the whole, the ALRC has not found these arguments convincing, but the fact that there is such widespread objection may suggest to some that fair use should not be introduced at this stage. Professor Hargreaves found it 'politically impossible' to recommend fair use for the UK.

13 P Leval, 'Toward a Fair Use Standard' (1989–1990) 103 *Harvard Law Review* 1105, 1111, quoted in W Patry, *Patry on Fair Use* (2012), 91.

14 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 9(2).

15 International IP Researchers, *Submission 713*.

16 See Ch 4.

6.40 The ALRC notes that many of those who opposed fair use will also oppose the new fair dealing exception. Some rights holders told the ALRC that copyright exceptions did not need to be reviewed, and that the existing law just needs to be more strongly enforced. However, the ALRC considers that the new fair dealing exception is a pragmatic second-best option. It has many of the same benefits of fair use, but it is considerably confined by its prescribed purposes.

6.41 A new fair dealing exception could be a step towards fair use. The Australian Government could introduce the exception recommended in this chapter, and then later consider whether to remove the limitation to the listed purposes, so that the exception became an open-ended fair use exception.¹⁷

6.42 However, in the ALRC's view, Australia is ready for, and needs, a fair use exception now. It might profitably have been enacted some time ago, perhaps when the CLRC recommended it in 1998.¹⁸ A new fair dealing exception does not need to be introduced as a preliminary stage to enacting fair use. However, if fair use is not enacted, then the new fair dealing exception recommended below will be a considerable improvement on the current set of exceptions in the *Copyright Act*.

Recommendation 6–1 If fair use is not enacted, the *Copyright Act* should be amended to provide that a fair dealing with copyright material for one of the following purposes does not infringe copyright:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) professional advice;
- (f) quotation;
- (g) non-commercial private use;
- (h) incidental or technical use;
- (i) library or archive use;
- (j) education; and
- (k) access for people with disability.

17 However, an intermediate stage might bring additional costs and uncertainty. There would be two changes in the law, rather than one. Further, some of the work done on settling the scope of the purposes for the fair dealing exception—in agreements, protocols and possibly litigation—would be less important if fair use were enacted later. Strictly demarcating the boundaries of the purposes is not necessary with fair use as the purposes are merely illustrative.

18 See Ch 4.

This provision should also provide that the fairness factors should be considered when determining whether the dealing is fair, along with any other relevant matter.

Note: This consolidates the existing fair dealing exceptions and provides that fair dealings for certain new purposes ((f)-(k)) also do not infringe copyright. Importantly, unlike fair use, this exception can only apply to a use of copyright material for one of the prescribed purposes. The purposes are not illustrative.

