

The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
SYDNEY NSW 2001

By email: [copyright@alrc.gov.au](mailto:copyright@alrc.gov.au); [info@alrc.gov.au](mailto:info@alrc.gov.au)

Submission by AMPAL to the ALRC Discussion Paper **Copyright and the Digital Economy**

The Australasian Music Publishers' Association welcomes the opportunity to respond to your "Copyright and the Digital Economy" discussion paper of June 5<sup>th</sup>.

The ALRC will not be surprised to learn that music publishers, along with the rest of the creative community, does not support the expanded free use of copyright material as proposed in the discussion paper. We do not believe that the arguments in favour of a broad free use exception are supported by solid evidence.

The discussion paper is a detailed and weighty piece of work, and a fascinating academic treatise. However it is unrelated to the commercial world and the practical effect of the implementation of its primary (and secondary) recommendations would, we believe, result in chaos and confusion.

The only beneficiaries would be the legal profession.

We do not intend in this submission to restate the arguments and positions that we and others have made in the original submissions. We focus our comments on your fair use doctrine as these recommendations overwhelm other considerations in the paper.

### US Fair Use

The proposed ALRC model is essentially the importation of the US fair use provisions.

The US system is based on years of case law and precedent, supported by a general culture of litigation. The US courts have found great difficulty in divining what qualifies as fair use. Lower court decisions are frequently over-turned due to broad judicial interpretation of the factors in each case.

Fair use litigation in the United States has been described as essentially a lottery, depending on the perspective of the ruling judge. This lack of clarity and different interpretations between cases means that judges end up determining the law in each individual case.

The effect is to shift the responsibility for copyright policy away from the Parliament in favour of the judiciary.

The Australian creative community, unlike the US, is not a particularly litigious one. We are concerned about what the lack of clarity and multiple interpretations of the proposed provisions would actually mean to our creative and commercial landscape. We could see the floodgates open to the broadest possible interpretation of the new provisions, with no viable recourse for many creators.

The US Copyright Act is markedly different to the Australian Act. Not only are there no moral rights under US law but there is no “communication to the public” right. And large statutory damages are a disincentive to frivolous claims for fair use protection.

All of this means that it would be naïve to think that Australian judges could rely on US precedent. The Australian court system – which is not resourced for extended copyright claims – would be clogged with cases.

We would inevitably find those well funded organisations (the ones who pay little tax in Australia) would be in a position to push the boundaries of what is fair use with impunity and challenge individual copyright owners to sue and spend years in court. Any copyright owner who chose to sue in such an uncertain environment would also face possibly crippling adverse costs awards – unlike the US situation where each party bears its own costs.

We are not sure how all this serves the public interest and we are certain that it is not in the best interest of creators and those who invest in them.

An immediate reaction to the discussion paper from one of our members (who is himself a prominent artist) was: “*Can of worms! The biggest cheque book wins. How could an ordinary citizen defend against the Moguls? The winners.....The Lawyers!*”

### Berne Convention

The difference between your list of “factors to be taken into account” and the Berne three step test is that the three step test means that each of the factors needs to be taken into account, not just some of them. Under your model there may be cases where a judge decides that other factors outweigh the effect on the potential market for or value of the material. Under Berne exceptions are only permitted in certain special cases, **and** provided that such reproduction does not conflict with a normal exploitation of the work **and** does not unreasonably prejudice the legitimate interests of the author.

### International comparisons

The proposed “flexible and open-ended” free use exceptions would be among the most generous in the world.

The paper talks about international competitiveness and cites the case of the Philippines, Israel, the Republic of Korea and Singapore as countries with broader fair use provisions than Australia. Yet there is little mention of the situation in other developed countries such as those in continental Europe where there is a widespread system of private copying levies in recognition that many of the accepted community practices in accessing copyright material have an adverse effect “on the potential market for or value of the material.”

The paper makes extensive references to the Hargreaves Review, but despite the anthropomorphic reference to the Review “expressing regret that it couldn’t recommend that the UK promote a fair use exception<sup>1</sup>” the fact is that the Hargreaves Review does not support the Google case for fair use: “....because we believe that the economic benefits of a more adaptive copyright regime are more likely to be attained in practice by the approach recommended above and because there are genuine legal doubts about the viability of a US case

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<sup>1</sup> 4.14

*law based legal mechanism in a European context.*<sup>2</sup> We also have genuine legal doubts about the viability of a US case law based legal mechanism in an Australian context.

### Caching, data mining etc

Unfortunately the ALRC Inquiry was hobbled from the outset by only being given a limited remit to look at copyright reform – a broader view might well have arrived at a more rounded conclusion. It makes no sense to make proposals regarding issues such as caching, indexing, data mining and network related functions without including reference to ISP liability and the safe harbour provisions.

### Conclusion

The ALRC asks whether the risks of uncertainty documented by stakeholders are outweighed by the advantages of the reforms proposed in this Discussion Paper<sup>3</sup>. Our answer is clear – no they are not.

We were disappointed with the recommendations, though in retrospect the composition of your advisory committee may have given us an indication of the direction the inquiry might head. It is unfortunate that so few representatives of the creative community were included on the committee.

By choosing to take such a radical approach to copyright exceptions, the ALRC has squandered the opportunity to make constructive proposals to improve the operation of our copyright laws.

Hopefully the next step in the process can provide some rigour to the ALRC's positions. It would be extremely helpful if the ALRC could provide some specific examples of how their free use proposals would work in the real world. For instance:

- We note that the discussion paper dealt at some length with the "Kookaburra case" (*EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd*), under both transformative use and quotation<sup>4</sup>. Under the regime proposed by the ALRC, how would this case have worked out? Would the use of the flute riff have qualified as fair transformative use or would it be free to use as a quotation?
- Would a music teacher in a school be able to freely copy print editions from a folio of musical works for the purpose of teaching students? Would such an outcome encourage the production of print music?
- When would a "mash-up" qualify for free use? Only when used in private or if subsequently used on YouTube?<sup>5</sup>
- Would a student film qualify for free use? What if the film was subsequently shown in a public competition?
- 9.49 of the report notes that "*.....private and domestic uses may be a good example of a fair use.*" However there is a lack of clarity over the precise definition of "private and domestic" (and "commercial and non-commercial"). Can this be clarified?

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<sup>2</sup> 5.41 Hargreaves Review of Intellectual Property and Growth

<sup>3</sup> 3.88

<sup>4</sup> 10.26, 10.27, 10.97, 10.99

<sup>5</sup> 9.7 Some social uses of copyright material—for example in creating and sharing user-generated content—may be fair, particularly when transformative. Such social uses can be considered under the fair use exception.

- What would happen if a user relied on Australia's new generous free use provisions but made their derived works available in another jurisdiction?
- How would the "adverse effect on the potential market for or value of the material" be measured when a supposed "fair" use of a work by the public might result in commercial damage in relation to existing licences with other parties?
- What redress would a composer have if their works were used in a "private and domestic" setting as background music to a violent or pornographic production? What would happen if such a production was subsequently shared on social media?
- Would a military band have free access to print music and to make adaptations under your "public administration" illustrative purpose? Would a local council function also be covered for such uses?
- Under your proposal do your free use provisions trump artists' moral rights? If not, how could individual artists be expected to assert their rights against a gigantic service that may exploit their works?
- We note that "fairness factors" for consideration in the proposed broader fair use exception include the amount, duration or substantiality of the work. How is this to be reconciled with numerous worldwide precedents specifically pertaining to songs which have held that the test of substantiality is qualitative rather than quantitative? As the most distinctive or recognisable part of a song can amount to as little as two or three notes, we consider this to be a critical oversight in the context of musical works and songwriters' interests.

We look forward to working through these issues with the ALRC before final recommendations are made to government.