

30th July 2013

The Executive Director
Australian Law Reform Commission
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Dear Sir or Madam

Copyright and the Digital Economy – inquiry and public consultation process

The British Copyright Council welcomes the opportunity to submit its comments on the discussion paper “Copyright and the Digital Economy.”

We hope that our experience during the discussions at a policy level on whether the United Kingdom should replace its “fair dealing” system with a US “fair use” system is helpful. The UK Government announced its comprehensive review of IP in November 2010 carried out by Professor Hargreaves. More specifically the review was tasked to “look at what the UK can learn from the US’s “fair use” rules covering the circumstances in which copyright material may be used without the rights-holder’s express permission.”¹

In his report² as subsequently accepted by the UK Government, Professor Hargreaves concluded that the wholesale adoption of a fair use approach into the UK legal framework would not be advisable. In particular he recognised that the success of the US technology sector is based on factors other than fair use such as the availability of a skilled work force and the different approach in the US to investment. In fact, the original statement that fair use was the key element for the establishment of Google in the US has been proven to be wrong.³

The British Copyright Council respectfully submits that the fair use system does not provide greater benefits than fair dealing. Interpreting “fair use” is more complex, resulting in greater uncertainty and it is more costly for all concerned. Consequentially, fair use is detrimental to all business in the creative value chain, from the original creator to the publisher or record company to the platform provider and ultimately to the end user.

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights. Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations operating within the creative and cultural industries. Our members also include collective management organisations which represent right holders and which enable access to works of creativity.

¹ <http://www.ipso.gov.uk/about/press/press-release/press-release-2010/press-release-20101104.htm>

² <http://www.ipso.gov.uk/preview-finalreport.pdf>

³ http://www.theregister.co.uk/2011/03/03/hargreaves_and_google/

We submitted a detailed paper to the call for evidence for the Hargreaves review of IP in the UK in which the British Copyright Council⁴ concluded that the fair dealing provisions in the UK Act provide the most effective method for addressing abuses, or too restrictive use of copyright licensing, particularly in a commercial context. Targeted exceptions, such as those in the UK Act (and in the Australian Act), are the best means for providing for non-commercial uses and guarding public access:

"We consider that it would be very damaging to introduce a general fair use exception into UK Copyright law. As stated above, the US fair use law was introduced in the US and was based on pre-existing case law. The same applies to the introduction in the UK of the Fair Dealing provisions. The Copyright Act 1911 was, preceded by case law, which assisted in the interpretation of the new legislation. If a US-style general fair use provision is introduced into UK copyright law without any existing case law to aid in its interpretation, there is bound to be a plethora of litigation to establish exactly what it means. No doubt, reference will be made to US cases. However, as mentioned above, these cases are often contradictory and have not given rise to great clarity. The existing Fair Dealing law in the UK seems to work well and does not give rise to a large amount of litigation. This would suggest that the UK law is clear and reasonably well understood and is working effectively."

On page 4⁵ onwards the British Copyright Council compared the UK fair dealing system (similar to the current Australian System) with the US fair use approach highlighting the (I) Complexity & Uncertainty of the US approach and (II) the Legal Costs and Expenses of US Fair Use Cases.

(I) Complexity & Uncertainty of the US approach

We believe that the UK's relatively clear and comprehensive legislation is the reason for there being only limited cases on exceptions being brought to Court. This compares with the large amount of litigation in the US on how to interpret and apply the fair use exception. An issue which is now seen as a concern within the US Copyright Office. The interpretation of "fairness" appears to be a lottery, depending on the respective judge and his views; leading to different interpretations between various instances which create great uncertainty.

(II) Legal Costs and Expenses of US Fair Use Cases

The uncertainties inherent in the fair use cases make it counterproductive, in particular for individuals and SMEs both in the creative and technology sector to rely on fair use; not only is it expensive to carry through a fair use case, there is the risk of suit by established players. As we have said, fair use is extremely complex and leads to uncertainty due to the broad judicial interpretation of the factors. This complexity and uncertainty causes the overruling of lower court decisions which in turn leads to further litigation and expense.

(III) Fair Dealing and Fair Use

We also submitted a paper prepared for us by the law firm Taylor Wessing on the impact of costs on legal proceedings in practice on Fair Dealing and Fair Use and which we add as an Annex.

⁴ <http://www.ipso.gov.uk/ipreview-c4e-sub-bcc.pdf>

⁵ <http://www.ipso.gov.uk/ipreview-c4e-sub-bcc.pdf>

Existing fair dealing exceptions/ Licensing

We respectfully submit that the current Australian Copyright law already contains detailed wording on the areas the ALRC suggest be covered by fair use, i.e. Non-consumptive Use, Private and Domestic Use; Transformative Use and Quotation; Libraries, Archives and Digitisation; Orphan Works; Educational Use; Retransmission of Free-to-air Broadcasts. There is no practical justification to change the existing system for presumably ideological⁶ reasons. As becomes clear from issues raised in your paper; changing the system is also complicated both at the drafting stage and the interpretation stage (in the absence of any case law on fair use in Australia).

Indeed the importance of clarity in drafting is at the centre of the current Technical Consultation on proposals to apply fair dealing to a number of narrow new exceptions in the UK. The BCC is able to provide further views and background to this, if this would be of assistance.

The activities to be addressed by the introduction of fair use are already covered by current licensing activities operating in parallel to the fair dealing exceptions. Introducing a fair use approach as outlined in the draft proposal of ALRC will conflict with the normal exploitation of creative works and thus the internationally binding Three Step Test.

If you need any further information or assistance from the British Copyright Council, please do not hesitate to contact me.

Yours faithfully,



Janet Ibbotson
Chief Executive Officer

⁶ Given the absence of any economic evidence justifying the changes proposed; and the alternatives provided to introducing a fair use approach, i.e. introducing new, and extending existing, exceptions

Annex 1

TaylorWessing

FAIR DEALING/FAIR USE

The purpose of this note is to summarise the information which we have been able to gather relating to:

the number of UK Fair Dealing cases and the number of US Fair Use cases since 1 January 1978; and

the cost of copyright litigation in the UK and in the US.

As will be seen, the information is far from complete. However, it does shed some light on these issues.

Number of UK Fair Dealing Cases

This was the most straightforward area to research. In our research, we have looked at decisions made on or after 1 January 1978, which is the date on which the US Copyright Act 1976 came into force and introduced for the first time in the US a statutory Fair Use regime.

On 1 January 1978, the Copyright Act 1956 (“the 1956 Act”) was still in force in the UK and it remained in force until 31 July 1989. On 1 August 1989, the Copyright, Designs and Patents Act 1988 (“the 1988 Act”) came into force in the UK and it is still in force, although it has been amended on several occasions since 1989.

Under both the 1956 Act and the 1988 Act there were/are a number of exceptions to copyright. In researching the cases, we have drawn a distinction between cases decided which involved the Fair Dealing provisions and those which involve other exceptions. Under the 1988 Act, there are 64 sections which set out the “act permitted in relation to copyright works”. However, only two of these (Section 29 and 30) deal with Fair Dealing as such. Under these sections, Fair Dealing is permitted for the purposes of private study (which must not be directly or indirectly for a commercial purpose) or non-commercial research, criticism or review or the reporting of current events.

The remaining exceptions (Sections 28 and 31 to 76) cover a wide range of activities such as, for example, recording for purposes of time shifting, incidental recording for purposes of broadcast etc. There was a similar regime in the 1956 Act, only with fewer exceptions. The reason that we have included the other exceptions is that some of them would be covered in the US by the US Fair Use legislation.

The number of reported decisions in the UK since 1 January 1978 is as follows:

- (i) Number of Fair Dealing cases decided under the 1956 Act: 4
- (ii) Number of Fair Dealing cases decided under the 1988 Act: 17
- (iii) Number of other exceptions cases decided under the 1956 Act: 13

(iv) Number of other exceptions cases decided under the 1988 Act: 40⁷⁸

The total number of cases decided⁹ during the period is 67 or approximately two per year. We can provide lists of these cases (together with short summaries) if this would be of use.

Number of Fair Use Cases in the US

It has proved much more difficult to obtain details of the number of reported decisions in Fair Use cases in the US.

We have been able to establish that there were not less than the following numbers of such decisions during the years ended June as set out below:

June 2010 - 8

June 2009 - 8

⁷ Five of these cases also dealt with fair dealing so are included in that total as well. To that extent, there is duplication between the two totals. Those five cases are: *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch); *HM Stationery Office v Green Amps Ltd* [2007] EWHC 2755 (Ch); *Universities U.K. Ltd v Copyright Licensing Agency Ltd* [2002] E.M.L.R. 35; *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2001] Ch. 257

⁸ Two of these cases also considered the 1956 Act so are included in that total as well. To that extent, there is duplication between the two totals. Those two cases are: *Jules Rimet Cup Ltd v Football Association Ltd* [2007] EWHC 2376; and *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328.

⁹ Excluding the duplication referred to above.

June 2008 - 7

June 2007 - 8

In an article entitled “An Empirical Study of U.S. Copyright Fair Use Opinions, 1978 – 2005”, published in the University of Pennsylvania Law Review – January 2008 Vol. 156 No. 3 Barton Beebe identified 306 reported opinions from 215 cases. This means that during the 28 years from 1 January 1978 to 31 December 2005 there was an average of just under 11 reported opinions per year.

Legal Costs and Expenses of UK Fair Dealing Case

It is difficult to generalise. The costs of any particular case will depend on a number of different factors, such as the amount of evidence, whether it is disputed, the complexity of the case, prospects of preliminary references to the ECJ and so on. However, the costs of bringing or defending a copyright case which goes to a full trial and a reported decision is likely to be somewhere between £250,000 and £500,000 (excluding any appeals). The newly reinvigorated Patents County Court (which has a cap on recoverable costs of £50,000 and is intended to provide a more streamlined judicial process) may mean that this figure may drop for the smaller and less complicated cases.

Legal Costs and Expenses of US Fair Use Case

A report by the American Intellectual Property Law Association estimates that the average cost to defend a copyright case is just under \$1 million. [Cited at page 42 in an

article by Giuseppina D'Agostino entitled "Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use – published in *Comparative Research in Law & Political Economy* 2007 (Vol: 03 No. 04)].

This is clearly an average figure and some cases will be more expensive and some less. For example, in the Google Books litigation, the latest draft of the Amended Settlement Agreement provides that Google will pay \$30 million towards the Plaintiffs' attorneys fees and costs. The Google Books case was a class action, involved a large number of parties and was extremely complex. Nevertheless, it was a Fair Use case and does demonstrate how difficult, complex and expensive US litigation involving Fair Use can be.

Dated: 22 February 2011