



**COPYRIGHT AND THE DIGITAL ECONOMY:  
RESPONSE TO DISCUSSION PAPER  
JULY, 2013**

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I strongly support most of the recommendations made by the Australian Law Reform Commission in the Discussion Paper released as part of the Copyright and the Digital Economy Inquiry. In particular, I wholeheartedly support the key proposals that:

- a) the *Copyright Act 1968* (Cth) ('the Act') should provide a broad, flexible exception for fair use; and
- b) the statutory licences in parts VA, VB and VII div 2 of the Act should be repealed.

I do however have some concerns regarding various aspects of the other proposals. Most of these have been comprehensively outlined in the joint submission of the Australian Digital Alliance (for which I am a member of the Board) and the Australian Libraries Copyright Committee ('ADA/ALCC'). I have attempted to avoid duplication of those concerns here. However, I wish to raise some additional concerns regarding Proposal 17-1.

Proposal 17-1 recommends that:

The Copyright Act should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect. These limitations on contracting out should apply to the exceptions for libraries and archives; and the fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

I strongly support safeguarding exceptions by privileging copyright over contract in appropriate cases. However, I am not convinced that Proposal 17-1 would always result in the most appropriate balance being reached. I note that the ALRC has expressed concern about 'the possibility of unintended effects' arising from its proposed limitation on contracting out, and invited further comment.<sup>2</sup> In the following pages I make the argument that Proposal 17-1,

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<sup>2</sup> Australian Law Reform Commission, *Copyright and the Digital Economy – Discussion Paper* (May 2013) at 375.

as currently drafted, may not do enough to protect the public interest in copyright exceptions, and propose amending it to try and give better effect to the ALRC's intention.

## **Reservations about Proposal 17-1**

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I have a number of reservations about Proposal 17-1. Some of these concerns, such as the difficulty in distinguishing between privileged and non-privileged uses, the potential for the distinction to result in unintentional narrowing of fair use in cases involving non-privileged uses and the possibility of increased uncertainty surrounding the possibility of contracting out of other exceptions, are more fully addressed in the joint submission of the ADA/ALCC.

This submission focuses on three particular questions:

1. What are the broader implications of the current proposal for contracting out?
2. Would the current Proposal 17-1 provide a sufficient mechanism for distinguishing between uses that can be contracted out of without harm to the public interest, and those that cannot?
3. Should we be concerned about the proposed solution resulting in presumptive unlawfulness?

### **1. What are the broader implications of the current proposal for contracting out?**

As the ALRC found in the Discussion Paper, there's a great deal of uncertainty regarding whether or not the current law permits contracting parties to bargain their way out of copyright exceptions.<sup>3</sup> It may be the case that some attempts to do so may be barred as a result of the public policy rule relating to the ouster of the jurisdiction of the courts.<sup>4</sup> However, others have noted that there is nothing in the Act suggesting that exceptions cannot be contractually pre-empted, and argued that, under the general law, 'the waiver of rights and entitlements is readily accepted, in the absence of express legislative prohibition.'<sup>5</sup> When the Copyright Law Review Committee comprehensively reported on this issue in 2002, it concluded that 'the enforceability of contracts purporting to exclude or modify the copyright exceptions is unsettled as a matter of domestic law.'<sup>6</sup>

In making Proposal 17-1, the ALRC acknowledged that '[t]here is legal doubt about the extent to which contracting out is enforceable', and found that 'more certainty is desirable in relation to some exceptions.'<sup>7</sup> This resulted in Proposal 17-1. With regard to the exceptions that were not expressly included in the Proposal, the ALRC stated that it was:

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<sup>3</sup> Ibid, at 357-361.

<sup>4</sup> See generally J Carter, E Peden, K Stammer, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32.

<sup>5</sup> Staniforth Ricketson and Chris Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Thomson, 2013) at [11.640].

<sup>6</sup> Copyright Law Review Committee, *Copyright and Contract* (2002) at 258.

<sup>7</sup> Australian Law Reform Commission, *Copyright and the Digital Economy – Discussion Paper* (May 2013) at 372.

not indicating that contractual terms excluding other exceptions should necessarily be enforceable. Rather, this is a matter that should be left to be resolved under the general law or other legislation, including the *Competition and Consumer Act*. If the ALRC's proposal is implemented, explanatory materials should record that Parliament does not intend the existence of an express provision against contracting out of these exceptions to imply that exceptions elsewhere in the *Copyright Act* can necessarily be overridden by contract.<sup>8</sup>

By ensuring certainty in some cases, Proposal 17-1 would certainly represent an improvement over the current situation. However, it is my view that the proposal could usefully do more to provide certainty in the case of non-privileged exceptions. There are two main reasons for this.

First, there is a danger that any provision stating that certain exceptions cannot be contracted out of may lead to the view that the others can be. It's reasonable to anticipate that this will in fact occur, and the proposed Explanatory Memorandum explaining that this was not the intention may not be sufficient to ameliorate the danger. This possibility is discussed in more detail in the ADA/ALCC submission.

Second, the growing significance of contracting out means that the issue is too important to take a punt on. As the ALRC recognised in the Discussion Paper, rightholders are routinely attempting to contract out of exceptions.<sup>9</sup> The issue of contracting out will become increasingly important as more content becomes available in digital-only form. That's because electronic content is often licensed, rather than sold, and because it's simple to draft a licence agreement in a way that grants narrower rights than those provided by the Act. It's the work of a moment to include words such as, 'the licensee agrees not to engage in any uses outside the term of this licence, including fair uses' – but that simple phrase, replicated across countless agreements, has the potential to do much to undermine the benefits of fair use and other exceptions. In many cases users wanting particular content have only one licensor to choose from, and thus the market does not do a good job of encouraging equitable terms. Instead, the choice is between accepting restrictive terms or being unable to legitimately access the content.

Given the ease with which contracting out can occur, the increasing opportunities for doing so, and the possibility that a privilege for some exceptions may make it more likely that attempts to contract out of others could be successful, I believe that it's vital that we take advantage of this reform opportunity to more definitively resolve this issue. This is the ideal time to act. As matters now stand, it is unclear whether attempts at contracting out would be enforceable. As noted above, if Proposal 17-1 is enacted in its current form, it will likely lead to a strong belief that it is possible to contract out of other exceptions. Once this view becomes entrenched, it will become much harder to remedy. This is a once in a generation opportunity to clarify the position in relation to all exceptions; and this should be preferred over continuation of the current lingering uncertainty.

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<sup>8</sup> Ibid, at 375.

<sup>9</sup> Ibid, at 354-357.

**2. Does the current proposal provide a sufficient mechanism for distinguishing between uses that can be contracted out of without harm to the public interest, and those that cannot?**

The ALRC's rationale for Proposal 17-1 'is to ensure that the public interests protected by copyright exceptions, including the proposed fair use exception, are not prejudiced by private arrangements.'<sup>10</sup> In determining which exceptions should be explicitly protected from override, the Commission focused on 'the extent to which exceptions are clearly for defined public purposes'.<sup>11</sup> As noted however, the proposed prohibition on contracting out would not extend to the full gamut of fair uses, with the Commission suggesting that any broader limitation on contracting out would 'not be practical or beneficial'.<sup>12</sup>

I would urge the Commission to give further thought to this position on the grounds that the instrument it proposes for achieving its aim is too blunt. In my view, Proposal 17-1 does not currently provide a sufficient mechanism for distinguishing between uses that it is appropriate to contract out of, and those that public policy dictates should be protected from private override.

It's easy to think of numerous examples of cases where contractual override of 'non-privileged' fair uses may well be contrary to the public interest. For example:

- a) institutions (that are not libraries or archives) providing access to disabled users for purposes other than the privileged ones;
- b) teachers providing content to students in reliance on fair use for 'education'. (Of course, if the students themselves made the copies, they would be relying on the privileged fair use for the purpose of research or study);
- c) individuals engaging in socially useful transformative and/or non-consumptive uses that build upon existing works, such as text or data mining, but which fall outside the privileged exceptions.

Such uses, and many others, may conceivably be more socially beneficial in a given fact scenario than a privileged use such as quotation or reporting. Excluding such uses from the privilege against contracting out would likely result in highly problematic outcomes. For one thing, as noted above, the fact that they were not included can reasonably be expected to give rise to a perception that non-privileged fair use rights can be contracted out of. For risk averse and shallow-pocketed institutions and individuals, this is likely to deter 'fair uses' in and of itself. Secondly, in the case of many uses, such as the first two examples provided, the perception that contracting out is permitted will mean that transaction costs become prohibitive. Instead of the institution or individual being able to simply exercise their fair use rights, they would have to check each individual agreement to see if those rights had been abrogated, and in what way. As Professor Ian Hargreaves observed, in reality will often be

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<sup>10</sup> Ibid, at 353.

<sup>11</sup> Ibid, at 373.

<sup>12</sup> Ibid, at 353-354.

that institutions ‘will restrict access to the most restrictive set of terms, significantly reducing the provisions for use established by law.’<sup>13</sup>

Teachers and others will be capable of applying fair use’s ‘fairness factors’ to make informed judgments about whether particular uses are permitted. However, requiring them to read and interpret each relevant contract as a precursor to doing so – often in circumstances where they do not have access to the contract itself – would waste resources without doing anything to forward the core public interest missions at issue.

### **3. Should we be concerned about the proposed solution continuing the problem of presumptive unlawfulness?**

One of the main reasons why Australia urgently needs to introduce fair use is because the current law results in presumptive unlawfulness. That is, emerging uses are presumptively unlawful unless and until the legislature enacts a purpose-based exception to protect them. This can occur at a glacial pace, as demonstrated by the fact that the Australian legislature did not enact a television time-shifting exception until some 22 years after the US Supreme Court recognised time-shifting as a fair use – and by the fact that the search and caching functions of search engines have *still* not been legitimised in Australia. Australia’s narrow purpose-based exceptions also mean that the first focus of any analysis is whether the use falls within one of the statutory ‘pigeonholes’, which means that the court may never even have an opportunity to consider the fairness of the use. As the Commission found in the Discussion Paper, ‘[c]opyright law that wishes to allow for the development of new technologies and services should not presumptively exclude uses of copyright material for particular purposes, without asking whether the use would be fair.’<sup>14</sup> I wholeheartedly agree with this view.

However, I am concerned that, in its current form, Proposal 17-1 would effectively perpetuate the problem of presumptive unlawfulness which the proposed introduction of fair use is intended to remedy.

As identified above, there are many examples of ‘non-privileged’ fair uses which may well be fairer and more socially beneficial than the privileged uses in a given fact scenario. However, under the existing Proposal 17-1, issues of fairness and public benefit would not be relevant considerations. I am strongly of the view that, when it comes to contracting out, as for exceptions generally, the focus should be on the purpose of the use rather than the pigeonhole it fits into. To do otherwise will result in some uses effectively being presumptively unlawful, even if they are ‘fair’ – precisely the same problem that fair use is designed to address.

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<sup>13</sup> Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) at 5.40.

<sup>14</sup> Australian Law Reform Commission, *Copyright and the Digital Economy – Discussion Paper* (May 2013) at 185.

## Recommendations

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### 1. Primary:

I support the recommendation of the ADA/ALCC that all fair uses be incorporated into Proposal 17-1, in addition to the uses already itemised therein. The question, then, would simply be: is the use fair?

Such a solution would do nothing to open the floodgates to free-riding: in order to qualify for the exception, the use would still have to meet the strict standard of ‘fairness’. Where a use is not ‘fair’ upon consideration of all relevant factors, including any public interest considerations and the precise terms of the licence, then the exception will not apply. This would maintain the focus squarely on the fairness of the use, rather than the pigeonhole in which it falls.

### 2. Secondary:

If however the ALRC still considers that it is not practical or desirable to render all attempts to contract out of exceptions unenforceable, I urge it to give further consideration to how the law might be tailored to further reduce the harms of this practice.

One possibility would be to add a catch-all to the situations named in the Discussion Paper. For example, in addition to the categories of conduct which Proposal 17-1 would currently protect, it could be made explicit that other attempts at contracting out will not be enforceable where doing so would be against the public interest.

Such a catch-all would more comprehensively and explicitly give effect to the ALRC’s motivation in recommending the privileging of some uses over contractual override in the first place, ie in order to protect the public interest. In my view however, a catch-all of this kind would:

- a) Eliminate the problem of presumptive unlawfulness by explicitly leaving the door open to the possibility of attempts to contract out of non-privileged fair uses being unenforceable on public interest grounds;
- b) Encourage contracting parties not to overreach when designing and enforcing contractual terms and conditions;
- c) Discourage wasteful litigation against non-privileged yet socially-beneficial uses.

This solution is not perfect. The notion of ‘the public interest’ is a slippery one, and in some cases, users and rightholders alike might be unsure about the extent to which attempts to contract out of exceptions would be enforceable. This uncertainty may still deter some socially beneficial uses. For that reason, if a catch-all were to be adopted, I would recommend that it supplement, rather than replace, the existing Proposal 17-1.

Despite its limitations, I consider that this kind of combined solution would nonetheless be preferable to the current proposal, which, while bringing welcome certainty for some

exceptions, would maintain or even worsen the uncertainty over whether contracting out can occur for others.

### **Conclusions: A once-in-a-generation opportunity**

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If the Australian law is amended to protect copyright exceptions from contractual override, there's no doubt that it will sometimes affect the incentives for creating and disseminating content. I am sympathetic to the view expressed by some rightholders that 'contracting out' gives them the flexibility to facilitate the efficient use of copyright materials and encourage businesses to respond to changing needs. I understand that, in exchange for giving up their statutory rights, institutions or individual users might sometimes be able to obtain access or terms that would otherwise be unavailable. However, when contracting out happens on a large scale, the resulting privately-arranged allocations of rights may not best give effect to the copyright law's fundamental aims of encouraging the creation and dissemination of knowledge. Given the importance of these aims, the ease with which exceptions can be overridden by contract, and the fact that the contractual terms could be relevant to the strict question of whether or not the use was 'fair' in the first place, further consideration should be given to tailoring the proposal to better protect the public interest.