

# CSIRO Submission 12/469

## Copyright and the Digital Economy

### Australian Law Reform Commission

#### Discussion Paper 79

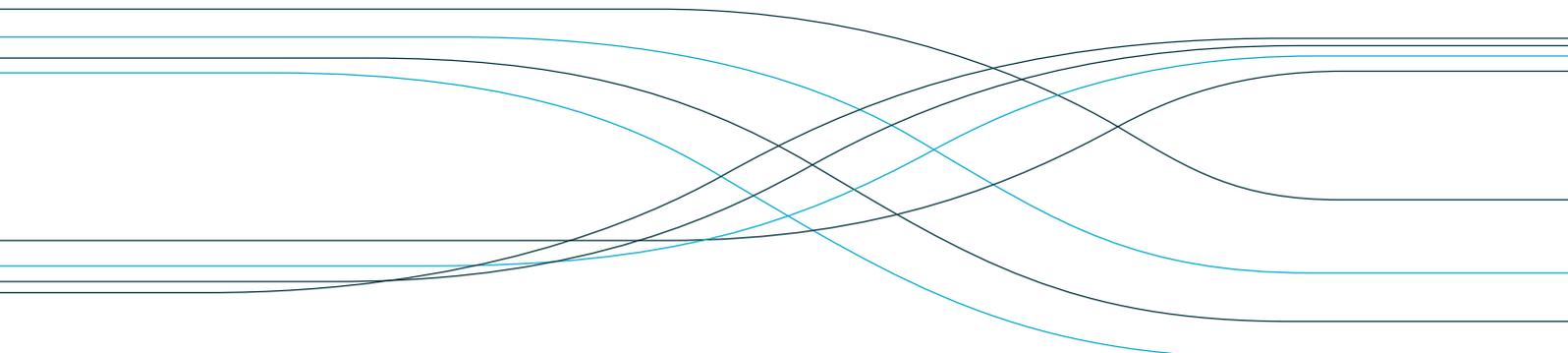
**August 2013**

**Enquiries should be addressed to:**

Susan McMaster  
343 Royal Parade, Parkville, Victoria  
T 03 9662 7415  
E [susan.mcmaster@csiro.au](mailto:susan.mcmaster@csiro.au)

**Main Submission Author:**

Susan McMaster  
Senior Legal Counsel,  
CSIRO



This submission is made on behalf of the Commonwealth Scientific and Industrial Research Organisation (CSIRO) in response to the Australian Law Reform Commissions' Discussion Paper concerning Copyright and the Digital Economy.

CSIRO submitted comments on certain of the issues identified in the ALRC's Issues Paper 42. Many of the issues raised in the ALRC's review are relevant to how CSIRO is able to fulfil its roles of carrying out scientific research for the benefit of Australia and Australian industry, collecting, interpreting and disseminating information relating to scientific and technical matters, and the publication of scientific and technical reports, periodicals and papers. As noted in CSIRO's Issues Paper submission, many of CSIRO's activities are now carried out online. The consideration of how the copyright system assists or hinders modern scientific research is valuable and CSIRO is grateful for the work being done by the ALRC and those by whom submissions have been made.

CSIRO's comments on the Discussion Paper and Proposals in that Paper are largely limited to those matters that were commented upon in our Issues Paper submission. CSIRO continues to support the principles for copyright law reform identified in the Issues Paper. In particular, the need to ensure that law promotes fair access to and wide dissemination of content (principle 4) and that the complexity of copyright law ought to be reduced (principle 7). The principle of promoting an adaptive, efficient and flexible framework (principle 8) is laudable and should guide recommendations around the development of rights management schemes to remove duplication and decrease transaction costs.

## **Proposals and Questions in the Discussion Paper**

### **4. The Case for Fair Use in Australia**

**Proposal 4–1** *The Copyright Act 1968 (Cth) should provide a broad, flexible exception for fair use.*

**Proposal 4–2** *The new fair use exception should contain:*

- (a) an express statement that a fair use of copyright material does not infringe copyright;*
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and*
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').*

**Proposal 4–3** *The non-exhaustive list of fairness factors should be:*

- (a) the purpose and character of the use;*
- (b) the nature of the copyright material used;*
- (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and*
- (d) the effect of the use upon the potential market for, or value of, the copyright material.*

**Proposal 4–4** *The non-exhaustive list of illustrative purposes should include the following:*

- (a) research or study;*
- (b) criticism or review;*
- (c) parody or satire;*
- (d) reporting news;*
- (e) non-consumptive;*
- (f) private and domestic;*
- (g) quotation;*
- (h) education; and*
- (i) public administration.*

**Question 4–1** *What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?*

**Question 4–2** *If fair use is enacted, the ALRC proposes that a range of specific exceptions be repealed. What other exceptions should be repealed if fair use is enacted?*

While acknowledging that this proposal would be a significant change and likely to produce some uncertainty at least initially, CSIRO is generally supportive of Proposals 4 – 1 to 4 – 4.

As to additional illustrative uses, we do not understand fully the reasons for not referencing the provision of professional advice as an illustrative purpose and therefore suggest it be included.

On the issue of providing greater certainty as to when a use will be regarded as fair, it would presumably remain open for the legislature to deem certain uses to be fair or non –infringing (for example, in similar vein to s 40 in respect of ‘reasonable portions’). CSIRO supports the development of legislative / regulatory backed guidelines to assist in the interpretation of a ‘fair use’ defence.

CSIRO considers it preferable to base exceptions on a ‘fair use’ basis rather than hard and fast rules between ‘commercial’ and ‘non-commercial’ uses, which are themselves terms open to much interpretation, for example. As we noted in our submission on the Issues Paper, there are difficulties in knowing when a use of copyright material is commercial and admittedly less likely to be fair. The focus in assessing commercial use should be on the whether the copyright material is used itself as, or as part of, a commercial product, rather than whether the material is used by any person in a commercial context such as in carrying out paid research or consultancy activities.

## **6. Statutory Licences**

**Proposal 6–1** *The statutory licensing schemes in pts VA, VB and VII div 2 of the Copyright Act should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.*

**Question 6–1** *If the statutory licences are repealed, should the Copyright Act be amended to provide for certain free use exceptions for governments and educational institutions that only operate where the use cannot be licensed, and if so, how?*

There is attraction in having efficient, fair and reliable licensing solutions in place at least for key areas of activity that benefits society where licences are not able to be obtained from a copyright owner and which might necessitate more than a ‘fair use’. Those areas would seem to include government, educational, or research purposes of public benefit (regardless of the organisation).

As a basis for the grant of copyright, and as a matter of public policy, these uses should not be restricted at the discretion of the rights holder.

## **7. Fair Dealing**

**Proposal 7–1** *The fair use exception should be applied when determining whether a use for the purpose of research or study; criticism or review; parody or satire; reporting news; or professional advice infringes copyright. ‘Research or study’, ‘criticism or review’, ‘parody or satire’, and ‘reporting news’ should be illustrative purposes in the fair use exception.*

**Proposal 7–2** *The Copyright Act should be amended to repeal the following exceptions:*

- (a) ss 40(1), 103C(1)—fair dealing for research or study;*
- (b) ss 41, 103A—fair dealing for criticism or review;*
- (c) ss 41A, 103AA—fair dealing for parody or satire;*
- (d) ss 42, 103B—fair dealing for reporting news;*
- (e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and*

*(f) ss 104(b) and (c)—professional advice exceptions.*

**Proposal 7–3** *If fair use is not enacted, the exceptions for the purpose of professional legal advice in ss 43(2), 104(b) and (c) of the Copyright Act should be repealed and the Copyright Act should provide for new fair dealing exceptions ‘for the purpose of professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney’ for both works and subject-matter other than works.*

**Proposal 7–4** *If fair use is not enacted, the existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should all provide that the fairness factors must be considered in determining whether copyright is infringed.*

CSIRO is generally in agreement with these proposals – see our comments in relation to Proposals 4 – 1 and 4 – 2 above.

In connection with professional advice, changes to clarify and make consistent are worthy if fair dealing is retained. The giving of professional advice should be retained as an illustrative purpose for determining if a use is fair use.

## **8. Non-consumptive Use**

**Proposal 8–1** *The fair use exception should be applied when determining whether uses of copyright material for the purposes of caching, indexing or data and text mining infringes copyright. ‘Non-consumptive use’ should be an illustrative purpose in the fair use exception.*

**Proposal 8–2** *If fair use is enacted, the following exceptions in the Copyright Act should be repealed:*

- (a) s 43A—temporary reproductions made in the course of communication;*
- (b) s 111A—temporary copying made in the course of communication;*
- (c) s 43B—temporary reproductions of works as part of a technical process of use;*
- (d) s 111B—temporary copying of subject-matter as a part of a technical process of use; and*
- (e) s 200AAA—proxy web caching by educational institutions.*

**Proposal 8–3** *If fair use is not enacted, the Copyright Act should be amended to provide a new fair dealing exception for ‘non-consumptive’ use. This should also require the fairness factors to be considered. The Copyright Act should define a ‘non consumptive’ use as a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.*

See comments on 4-1 and 4 -2 above. CSIRO agrees that non-consumptive uses should be an illustrative purpose for ‘fair use’ and supports moves to seek simpler and broader provisions that do not rely on multiple specific exceptions. However, the term ‘underlying creative and expressive purpose’ (perhaps much like ‘commercial use’) is potentially difficult to define and may generate uncertainty in practice. If this phrase is to be used, the legislation should expressly define further areas of permitted use, such as for any actions that are reasonably incidental to enable a copyright work’s legitimate use, viewing, access, distribution etc. This would include both the enabling of web search technology (as being reasonably incidental to viewing material via the internet) as well as automatic cache type processes.

## **10. Transformative Use and Quotation**

**Proposal 10–1** *The Copyright Act should not provide for any new ‘transformative use’ exception. The fair use exception should be applied when determining whether a ‘transformative use’ infringes copyright.*

**Proposal 10–2** *The fair use exception should be applied when determining whether quotation infringes copyright. ‘Quotation’ should be an illustrative purpose in the fair use exception.*

**Proposal 10–3** *If fair use is not enacted, the Copyright Act should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.*

CSIRO supports the introduction of a fair use defence with quotation as an illustrative purpose. Should ‘fair use’ not be introduced, a fair dealing for the purposes of quotation defence is appropriate.

## **12. Orphan Works**

**Proposal 12–1** *The fair use exception should be applied when determining whether a use of an ‘orphan work’ infringes copyright.*

**Proposal 12–2** *The Copyright Act should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:*

- (a) a ‘reasonably diligent search’ for the rights holder had been conducted and the rights holder had not been found; and*
- (b) as far as reasonably possible, the work was clearly attributed to the author.*

**Proposal 12–3** *The Copyright Act should provide that, in determining whether a ‘reasonably diligent search’ was conducted, regard may be had, among other things, to:*

- (a) how and by whom the search was conducted;*
- (b) the search technologies, databases and registers available at the time; and*
- (c) any guidelines or industry practices about conducting diligent searches available at the time.*

CSIRO supports these Proposals. As to remedies, CSIRO supports the view that should a rights holder step forward, remedies for infringement of orphan works should be limited to payment of a reasonable fee for any further use. The rights holder should expressly be restricted in their ability to take injunctive action where this would be to the detriment of the user, who made a reasonably diligent search.

We would support a system that required the user to conduct reasonable searches for the rights holder of the orphan works before engaging in use that would constitute infringement of copyright. As part of this, it would be useful if there was a central register where a work could be registered (by any user) as an orphan work, subject to the rights holder coming forward and disputing this claim. However, this should not be a necessary step in the use of orphan works, and only a deliberative factor.

We stress that the searching process should not be onerous or burdensome on the user or require significant expenditure. Collecting societies would be free to make a database available for public searching on the internet in order to ensure that users were able to adequately identify rights holders to works that may otherwise be deemed ‘orphan’, but CSIRO reiterates its view that a licence fee should not be paid to a generic collecting society in the circumstances where the identity of the rights holder in a work is unknown and reasonably likely to remain unknown.

## **13. Educational Use**

**Proposal 13–1** *The fair use exception should be applied when determining whether an educational use infringes copyright. ‘Education’ should be an illustrative purpose in the fair use exception.*

**Proposal 13–2** *If fair use is not enacted, the Copyright Act should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.*

**Proposal 13–3** *The exceptions for education in ss 28, 44, 200, 200AAA and 200AB of the Copyright Act should be repealed.*

CSIRO agrees that fair use or fair dealing for education is appropriate.

#### **14. Government Use**

**Proposal 14–1** *The fair use exception should be applied when determining whether a government use infringes copyright. ‘Public administration’ should be an illustrative purpose in the fair use exception.*

**Proposal 14–2** *If fair use is not enacted, the Copyright Act should provide for a new exception for fair dealing for public administration. This should also require the fairness factors to be considered.*

**Proposal 14–3** *The following exceptions in the Copyright Act should be repealed:*

*(a) ss 43(1), 104—judicial proceedings; and*

*(b) ss 48A, 104A—copying for members of Parliament.*

CSIRO agrees with this Proposal in general terms. As to what is encompassed within ‘Public Administration’, it may be argued that only public persons engaged in public administration would be entitled to the benefit of this exception. As effective public administration may rely on private individuals or companies providing input, any limitation to public officials would not necessarily be appropriate.

By way of observation only, where material is required to be made open to public inspection then it might be assumed that the legislature takes the view that public accessibility is important. If that assumption holds true then it would seem inappropriate if public access online was not facilitated because of copyright concerns. By way of example, the Patents Act s.27 requires information provided to the Patents Office on issues of validity to be made OPI. Here it is relevant to consider the needs of the Australian innovation system, in particular the need to minimise the grant of patents that may add little in terms of scientific advancement but operate at a business level to block the implementation or building upon by Australian innovators of technology that is already in the public domain. The ability to be able to review patent applications and associated literature online and without unnecessary administrative or resource effort facilitates the monitoring that is needed to enhance the Australian innovation system and protect against such questionable applications. It should be possible to implement technical solutions to the inappropriate use of copyright material in these circumstances. For example, we note that the European Patents Office makes material available on a view only basis and warns of the potential need for copyright permission if the viewer needs to deal with the copyright material in a way that might infringe copyright rights.

#### **17. Contracting Out**

**Proposal 17–1** *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.*

In CSIRO’s response to the Issues Paper we noted the difficulty of drawing a boundary between acceptable and unacceptable contracting out. The Discussion Paper reflects the problems that arise and we acknowledge the goal of Proposal 17-1 is to identify at least some areas of free use that the ALRC considers should be preserved on public policy grounds. There may of course be other areas that public

policy dictates should remain free such as the proposed illustrative purposes that are proposed beyond those set out in Proposal 17- 1 (e.g public administration and non-consumptive uses).

If the view is that contracting out of at least some areas should not be permitted on a public policy basis, then it would seem appropriate to ensure that an exercise of those free rights in Australia is protected notwithstanding governing law of the relevant contract. The Discussion Paper suggested that this may not be the case (at paragraph 17.121) and further consideration needs to be given to whether that is a desirable outcome or whether Australian users exercising free use rights should be protected from inappropriate contractual provisions regardless of governing law issues, in the same way that consumers, for example, are protected under statutes governing the supply of goods and services in Australia.

While contracting out prohibitions may not be able to be enforced when copyright is in dispute in other jurisdictions, the governing law of a contract would be no impediment to preventing contracting out of the Australian copyright legislation when a matter was before an Australian judicial body.