

# Recommendations

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## 4. The Case for Fair Use

**Recommendation 4–1** The *Copyright Act 1968* (Cth) should provide an exception for fair use.

## 5. The Fair Use Exception

**Recommendation 5–1** The 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 use ('the illustrative purposes').

**Recommendation 5–2** The non-exhaustive list of fairness factors should be:

- (a) the purpose and character of the use;
- (b) the nature of the copyright material;
- (c) the amount and substantiality of the part used; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

**Recommendation 5–3** 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) 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.

**Recommendation 5–4** The *Copyright Act* should be amended to repeal the following exceptions:

- (a) ss 40, 103C—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.

The fair use or new fair dealing exception should be applied when determining whether one of these uses infringes copyright.

## **6. The New Fair Dealing Exception**

**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.

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.

## 8. Statutory Licences

**Recommendation 8–1** The *Copyright Act* should be amended to clarify that the statutory licences in pts VA, VB and VII div 2 do not apply to a use of copyright material which, because of another provision of the Act, would not infringe copyright. This means that governments, educational institutions and institutions assisting people with disability, will be able to rely on unremunerated exceptions, including fair use or the new fair dealing exception, to the extent that they apply.

**Recommendation 8–2** The *Copyright Act* should be amended to clarify that the statutory licences in pts VA, VB and VII div 2 do not apply to a use of copyright material where a government, educational institution, or an institution assisting people with disability, instead relies on an alternative licence, whether obtained directly from rights holders or from a collecting society.

**Recommendation 8–3** The *Copyright Act* should be amended to remove any requirement that, to rely on the statutory licence in pt VII div 2, governments must notify or pay equitable remuneration to a declared collecting society. Governments should have the option to notify and pay equitable remuneration directly to rights holders, where this is possible.

**Recommendation 8–4** The statutory licences in pts VA, VB and VII div 2 of the *Copyright Act* should be made less prescriptive. Detailed provisions concerning the setting of equitable remuneration, remuneration notices, records notices, sampling notices, and record keeping should be removed. The Act should not require sampling surveys to be conducted. Instead, the Act should simply provide that the amount of equitable remuneration and other terms of the licences should be agreed between the relevant parties, or failing agreement, determined by the Copyright Tribunal.

## 9. Quotation

**Recommendation 9–1** The fair use or new fair dealing exception should be applied when determining whether a quotation infringes copyright.

## 10. Private Use and Social Use

**Recommendation 10–1** The exceptions for format shifting and time shifting in ss 47J, 109A, 110AA and 111 of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether a private use infringes copyright.

## 11. Incidental or Technical Use and Data and Text Mining

**Recommendation 11–1** The exceptions for temporary uses and proxy web caching in ss 43A, 111A, 43B, 111B and 200AAA of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether incidental or technical uses infringe copyright.

## 12. Libraries and Archives

**Recommendation 12–1** Section 200AB of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether uses by libraries and archives infringes copyright.

**Recommendation 12–2** The exceptions for preservation copying in ss 51A, 51B, 110B, 110BA and 112AA of the *Copyright Act* should be repealed. The *Copyright Act* should provide for a new exception that permits libraries and archives to use copyright material for preservation purposes. The exception should not limit the number or format of copies that may be made.

## 13. Orphan Works

**Recommendation 13–1** 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 user of the work has clearly attributed it to the author.

**Recommendation 13–2** The *Copyright Act* should provide that, in determining whether a reasonably diligent search was conducted, regard may be had to, among other things:

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

## 14. Education

**Recommendation 14–1** The exceptions for educational use in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether an educational use infringes copyright.

## 15. Government Use

**Recommendation 15–1** The parliamentary libraries exceptions in ss 48A, 50(1)(aa) and 104 of the *Copyright Act* should be extended to apply to all types of copyright material and all exclusive rights.

**Recommendation 15–2** The *Copyright Act* should provide for a new exception for the purpose of the proceedings of a tribunal, or for reporting those proceedings.

**Recommendation 15–3** The *Copyright Act* should provide for a new exception for the purpose of the proceedings of a royal commission or a statutory inquiry, or for reporting those proceedings.

**Recommendation 15–4** The *Copyright Act* should provide for a new exception for uses where statutes require local, state or Commonwealth governments to provide public access to copyright material.

**Recommendation 15–5** The *Copyright Act* should provide for a new exception for use of correspondence and other material sent to government. This exception should not extend to uses that make previously published material publicly available.

## 16. Access for People with Disability

**Recommendation 16–1** The fair use or new fair dealing exception should be applied when determining whether a use for access for people with disability infringes copyright.

## 18. Retransmission of Free-to-air Broadcasts

**Recommendation 18–1** In developing media and communications policy, and in responding to media convergence, the Australian Government should consider whether the retransmission scheme for free-to-air broadcasts provided by pt VC of the *Copyright Act* and s 212(2) of the *Broadcasting Services Act 1992* (Cth) should be repealed.

Note: This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

**Recommendation 18–2** If the retransmission scheme is retained, the scope and application of the internet exclusion in s 135ZZJA of the *Copyright Act* should be clarified.

## 19. Broadcasting

**Recommendation 19–1** In developing media and communications policy, and in responding to media convergence, the Australian Government should consider whether the following exceptions in the *Copyright Act* should be repealed:

- (a) s 45—broadcast of extracts of works;
- (b) ss 47, 70 and 107—reproduction for broadcasting;
- (c) s 109—broadcasting of sound recordings;
- (d) ss 65 and 67—incidental broadcast of artistic works; and
- (e) s 199—reception of broadcasts.

**Recommendation 19–2** The Australian Government should also consider whether the following exceptions should be amended to extend to the transmission of linear television or radio programs using the internet or other forms of communication to the public:

- (a) s 47A—sound broadcasting by holders of a print disability radio licence; and
- (b) pt VA—copying of broadcasts by educational institutions.

## **20. Contracting Out**

**Recommendation 20–1** The *Copyright Act* should provide that any term of an agreement that restricts or prevents the doing of an act, which would otherwise be permitted by specific libraries and archives exceptions, is unenforceable.

**Recommendation 20–2** The *Copyright Act* should not provide statutory limitations on contracting out of the fair use exception. However, if fair use is not enacted, limitations on contracting out should apply to the new fair dealing exception.