

4. The Case for Fair Use

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Summary

4.1 The ALRC recommends the introduction of a fair use exception into Australian copyright law. This chapter briefly explains what fair use is, and makes the case for enacting fair use in Australia. It sets out some of the important arguments for and against introducing this exception.

4.2 Fair use is a defence to copyright infringement that essentially asks of any particular use: Is this fair? In deciding whether a use is fair, a number of principles, or 'fairness factors', must be considered. These include the purpose and character of the use and any harm that might be done to a rights holder's interests by the use.

4.3 Importantly, fair use differs from most current exceptions to copyright in Australia in that it is a broad standard that incorporates principles, rather than detailed prescriptive rules. Law that incorporates principles or standards is generally more flexible and adaptive than prescriptive rules. Fair use can therefore be applied to new technologies and new uses, without having to wait for consideration by the legislature.

4.4 The factors in the fair use exception ask the right questions of particular uses of copyright material. Does this use unfairly harm a market the rights holder alone should be able to exploit, and so undermine the incentive to create? If so, it is unlikely to be fair. Is this use for an important public purpose, or perhaps for a different purpose than that for which the creator or rights holder intended? If so, the use is unlikely to harm the rights holder and should be permitted, facilitating the public interest in accessing material, encouraging new productive uses, and stimulating competition and innovation.

4.5 Fair use is not a radical exception. It largely codifies the common law, and may be seen as an extension of Australia's fair dealing exceptions. Guidance on its meaning and application can be found in the case law on fair dealing in Australia, the United Kingdom and other countries with fair dealing exceptions. Arguably more helpful will be case law applying the very similar fair use provision in the United States, and industry guidelines and codes that would be prepared if fair use were enacted.

4.6 Copyright exceptions need to be certain and predictable, in part so that rights holders and users have the confidence to invest in innovation. Although standards may generally be more flexible and less certain than detailed rules, the ALRC considers that a clear and principled standard like fair use is sufficiently certain in scope—and arguably more certain than much of Australia's highly complex, sometimes nearly indecipherable, *Copyright Act*.

4.7 Finally, this chapter discusses whether fair use—an exception codified by the US over 30 years ago—is consistent with international law. The ALRC concludes that it is.

What is fair use?

4.8 Fair use is a statutory provision that provides that a use of copyright material does not infringe copyright if it is 'fair', and that when considering whether the use is fair, certain principles or 'fairness factors' must be considered. The provision also includes a list of 'illustrative purposes'.

4.9 Most fair use provisions around the world list the same four fairness factors. These are also factors that appear in the current Australian exceptions for fair dealing for the purpose of research or study.¹ The four fairness factors are non-exhaustive; other relevant factors may be considered.

4.10 In other jurisdictions, fair use provisions set out illustrative purposes—these are examples of broad types or categories of use or purposes that may be fair. A particular use does not have to fall into one of these categories to be fair. This is one of the key benefits of fair use. Unlike the fair dealing provisions, fair use is not limited to a set of prescribed purposes.

1 *Copyright Act 1968* (Cth) ss 40(2), 103C(2), 248A(1A).

4.11 Further, just because a use falls into one of the categories of illustrative purpose, does not mean that such a use will necessarily be fair. It does not even create a presumption that the use is fair. In every case, the fairness factors must be ‘explored, and the results weighed together, in light of the purposes of copyright’.²

4.12 Fair use largely codifies the common law and shares the same common law sources as fair dealing.³ One stakeholder stated that fair use has ‘always been an integral part of copyright law in the common-law world, and it is the notion of an exhaustive list of statutory exceptions that is foreign’.⁴ Fair use has been enacted in a number of countries,⁵ most notably in the US.⁶

4.13 The codification of fair use in the US took effect in 1978. The intention was to restate copyright doctrine—‘not to change, narrow, or enlarge it in any way’.⁷ There was no intention ‘to freeze the doctrine in the statute, especially during a period of rapid technological change’.⁸ Section 107 of the US *Copyright Act* provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

2 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 577.

3 See, eg, W Patry, *Patry on Fair Use* (2012), 9–10; M Sag, ‘The Prehistory of Fair Use’ (2011) 76 *Brooklyn Law Review* 1371; A Sims, ‘Appellations of Piracy: Fair Dealing’s Prehistory’ (2011) *Intellectual Property Quarterly* 3; M Richardson and J Bosland, ‘Copyright and the New Street Literature’ in C Arup (ed) *Intellectual Property Policy Reform: Fostering Innovation and Development* (2009) 199, 199; R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 253–264; Copyright Law Review Committee, *Copyright and Contract* (2002), 25.

4 A Katz, *Submission 606*. See also K Bowrey, *Submission 554* (‘Twentieth century copyright legislation, which utilised the term fair dealing instead of fair use, was not designed to ... constrain flexible approaches to judicial interpretation of rights’).

5 See, eg, *Copyright Act 1967* (South Korea) art 35–3; *Copyright Act 2007* (Israel) s 19; *Intellectual Property Code of the Philippines*, Republic Act No 8293 (the Philippines) s 185.

6 *Copyright Act 1976* (US) s 107.

7 United States House of Representatives, Committee on the Judiciary, *Copyright Law Revision (House Report No. 94-1476)* (1976), 5680.

8 *Ibid.*

Reviews that have considered fair use

4.14 The Terms of Reference direct the ALRC to take into account recommendations from related reviews. A number of reviews, in Australia and in other jurisdictions, have considered the merits, or otherwise, of introducing fair use.

Recent international reviews

4.15 In the UK, the Hargreaves Review was specifically asked to investigate the benefits of a fair use exception and how these benefits might be achieved.⁹ Professor Hargreaves found that the current state of European Union (EU) law meant that there would be considerable difficulties in introducing a fair use exception into the UK.¹⁰ For this reason, Professor Hargreaves did not recommend fair use, ‘the big once and for all fix’,¹¹ but instead considered how the benefits of fair use could be achieved through other means.

4.16 The Copyright Review Committee (Ireland) also released a report in late October 2013. It took a different view from the Hargreaves Review, in that it considered that ‘there is scope under EU law for member states to adopt a fair use doctrine as a matter of national law’ and recommended the enactment of a fair use exception.¹²

4.17 The Ireland Review considered that a fair use exception should be enacted in that jurisdiction for two reasons. First, it considered that ‘it is simply not possible to predict the direction in which cloud computing and 3D printing are going to go, and it is therefore impossible to craft appropriate *ex ante* legal responses’.¹³ Secondly, ‘it will send important signals about the nature of the Irish innovation ecosystem’ and ‘it will provide the Irish economy with a competitive advantage in Europe’.¹⁴

4.18 The fair use exception recommended in the Ireland Review differs from the US provision, and from the exception recommended in this Report, in that it provides for the existing exceptions to be regarded as examples of fair use and for the fairness of other uses to be assessed on the basis of up to eight separate factors.¹⁵

9 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 101.

10 Ibid, 46. Some scholars have challenged the view that a member state of the EU cannot introduce flexible copyright norms. See, eg, B Hugenholtz and M Senftleben, *Fair Use in Europe: In Search of Flexibilities* (2011). More recently, Professor Hargreaves has described fair use as ‘the backbone of a healthy Internet-economy ecosystem in the US’: I Hargreaves and B Hugenholtz, ‘Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework’ (2013) 13 *Lisbon Council Policy Brief* 1.

11 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 52.

12 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 91.

13 Ibid, 93.

14 Ibid. It was also considered beneficial because it would ‘give Irish law a leadership position in EU copyright debates’.

15 Ibid, 11, 89–97.

Australian reviews

4.19 This Inquiry is not the first Australian review to consider whether the *Copyright Act* should recognise the fair use of copyright material,¹⁶ although some stakeholders consider that it has not been given ‘a sufficiently thorough examination in Australian law reform processes’ to date.¹⁷

The CLRC simplification review

4.20 In 1996, the Australian Government asked the Copyright Law Review Committee (CLRC), chaired by Professor Dennis Pearce, to consider how the *Copyright Act* could be simplified ‘to make it able to be understood by people needing to understand their rights and obligations’.¹⁸

4.21 In its 1998 report, the CLRC recommended the introduction of fair use—or at least, an open-ended fair dealing provision that is largely indistinguishable from fair use.

4.22 The CLRC recommended the consolidation of the fair dealing provisions into a single section¹⁹ and the expansion of fair dealing to an ‘open-ended model’ that would not be confined to the ‘closed-list’ of fair dealing purposes.²⁰ The CLRC recommended that the non-exhaustive list of five fairness factors in s 40(2) of the *Copyright Act* specifically apply to all fair dealings.²¹

4.23 The CLRC recommended the following text for the consolidated statutory provision:

- (1) Subject to this section, a fair dealing with any copyright material for any purpose, including the purposes of research, study, criticism, review, reporting of news, and professional advice by a legal practitioner, patent attorney or trade mark attorney, is not an infringement of copyright.
- (2) In determining whether in any particular case a dealing is a fair dealing, regard shall be had to the following:
 - (a) the purpose and character of the dealing;
 - (b) the nature of the copyright material;
 - (c) the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price;
 - (d) the effect of the dealing upon the potential market for, or value of, the copyright material;

16 For an overview of the history of the review, see M Wyburn, ‘Higher Education and Fair Use: A Wider Copyright Defence in the Face of the Australia—United States Free Trade Agreement Changes’ (2006) 17 *Australian Intellectual Property Journal* 181.

17 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

18 Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [1.03].

19 However, the CLRC recommended that the quantitative test be included in ‘a stand-alone provision separate from the new fair dealing provision’: *Ibid.*, [6.10].

20 *Ibid.*, [2.01]–[2.03].

21 See also *Ibid.*, [2.04], [6.36]–[6.44].

- (e) in a case where part only of the copyright material is dealt with—the amount and substantiality of the part dealt with, considered in relation to the whole of the copyright material.²²

4.24 The CLRC considered that its model was ‘sufficiently flexible to accommodate new uses that may emerge with future technological developments’ and that it also contained ‘enough detail to provide valuable guidance to both copyright owners and users’.²³ The model was described as a ‘neat and elegant one that will bring the existing multiplicity of exceptions into a coherent and orderly relationship’.²⁴ The Australian Government did not formally respond to the CLRC’s recommendations.

4.25 It is interesting to reflect on whether Australia might have been better placed to participate in the growth of the nascent digital economy, had the CLRC’s fair use exception been enacted in 1998.

Intellectual Property and Competition Review Committee

4.26 In September 2000 the Intellectual Property and Competition Review Committee, chaired by Henry Ergas (Ergas Committee), considered the CLRC’s recommendation for expansion of the fair dealing purposes. It reported that it did ‘not believe there is a case for removing the elements of the current *Copyright Act*, which define certain types of conduct as coming within the definition of fair dealing’.²⁵ In the context of reviewing copyright in terms of competition policy, the Ergas Committee considered that, at that time, the transaction costs of introducing fair use would outweigh the benefits.²⁶

The Attorney-General’s Department’s Fair Use Review

4.27 The Australian Government Attorney-General’s Department’s Fair Use Review (AGD Fair Use Review) considered the CLRC and Ergas Committee’s respective relevant recommendations, as well as a recommendation that had been made by the Joint Standing Committee on Treaties (JSCOT) in considering whether the *Australia–United States Free Trade Agreement* (AUSFTA) would be in the national interest.

4.28 JSCOT had recommended replacing fair dealing with something closer to the US fair use doctrine ‘to counter the effects of the extension of copyright protection and to correct the legal anomaly of time shifting and space shifting’.²⁷

4.29 A final report was not issued. However, after the Review, a number of reforms were enacted—notably exceptions for time and format shifting and fair dealing for parody and satire.

22 Ibid, [6.143].

23 Ibid, [6.08].

24 S Ricketson, ‘Simplifying Copyright Law: Proposals from Down Under’ (1999) 21(11) *European Intellectual Property Review* 537, 549.

25 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 15.

26 Ibid, 129.

27 The Joint Standing Committee on Treaties—Parliament of Australia, *Report 61: The Australia–United States Free Trade Agreement* (2004), Rec 17.

4.30 The Australian Government did not enact a fair use exception, stating that, in the public consultation phase, ‘no significant interest supported fully adopting the US approach’.²⁸

Fair use builds on Australia’s fair dealing tradition

4.31 Far from being a ‘radical’ exception, fair use is an extension of Australia’s longstanding and widely accepted fair dealing exceptions. The principles encapsulated in fair use and fair dealing exceptions also have a long common law history, traced back to eighteenth century England.²⁹

4.32 Many of the benefits of fair use, discussed in this chapter and throughout the Report, are also benefits of the fair dealing exceptions. Both require an assessment of fairness in light of a set of principles.

4.33 The crucial difference between the exceptions is that fair dealing is confined to prescribed purposes—or types of use—while fair use is not. The ALRC considers that there is no need to confine fairness exceptions to a set of prescribed purposes. By recommending fair use, the ALRC may, in essence, merely be removing an unnecessary restriction on Australia’s existing fair dealing exceptions.³⁰

4.34 Australian legislation first used the expression ‘fairly dealing’ in its *Copyright Act 1905* (Cth)—the first common law country to do so.³¹ There are five fair dealing exceptions in the current *Copyright Act*, one for each of the following purposes:

- research or study;³²
- criticism or review;³³
- parody or satire;³⁴
- reporting news;³⁵ and
- a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.³⁶

28 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 10. However, it should be noted that a number of submissions—presumably defined as coming before ‘the public consultation phase’—did argue in favour of a broad, flexible exception. Further, ‘personal consumers’ had supported an open-ended exception: Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 12.

29 For example, see M Sag, ‘The Prehistory of Fair Use’ (2011) 76 *Brooklyn Law Review* 1371.

30 A fairness exception like fair use, but confined to a set list of prescribed purposes, is the ALRC’s second best option for reform—a new fair dealing exception, discussed in Ch 6.

31 M De Zwart, ‘A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age’ (2007) 1 *Intellectual Property Quarterly* 60, 89.

32 *Copyright Act 1968* (Cth) ss 40(1), 103C(1).

33 *Ibid* ss 41, 103A.

34 *Ibid* ss 41A, 103AA.

35 *Ibid* ss 42, 103B.

36 *Ibid* s 43(2). Note s 104(c), which could be seen as the equivalent provision for subject matter other than works, does not in fact use the term ‘fair dealing’. Similarly, ss 43(1), 104(a) (anything done for the purposes of a judicial proceeding or a report of a judicial proceeding) and 104(b) (someone seeking professional advice from a legal practitioner, registered patent attorney or registered trade marks attorney) do not use the term ‘fair dealing’. All of these exceptions are broader than the fair dealing exceptions.

4.35 Applying a fair dealing exception is a two-step process. First, the use must be for one of the specific purposes listed in the *Copyright Act*. Secondly, the use must be fair. Fairness factors are specified in the statute for uses for research and study, but for other fair dealings, fairness is left to the common law.³⁷ Fair use removes this first step—the purposes listed in the fair use exception are merely illustrative. This means that fair use can be applied to a much larger range of use of copyright materials. For some, this makes fair use too broad and uncertain. The ALRC considers that this makes the provision more flexible, and that the question of fairness in light of the fairness factors sufficiently confines the exception. Fair use may permit more unlicensed uses than the existing fair dealing exceptions, but only fair uses—transformative uses, and uses that will not unfairly harm rights holders.

4.36 Fair use improves upon the current fair dealing exceptions in other respects. For example, not all of the current fair dealing exceptions are available for all types of copyright material. Fair use, however, could be applied to any copyright material. This does not mean that fair use will have the same outcome for all types of copyright material. Differences in markets mean that this would not be fair. But fair use at least has the flexibility to ask the question of fairness of any type of use, and any type of copyright material.

4.37 Additional requirements must also be met for some fair dealing exceptions to apply. For example, some require sufficient acknowledgement of the material used.³⁸ Others include a quantitative test that deems the use of certain quantities of copyright material to be fair.³⁹ The concept of ‘reasonable portion’ is fixed by reference to chapters, or 10% of the number of pages or number of words.⁴⁰ Although such additional requirements could, in theory, be incorporated in a fair use exception, the ALRC favours a less prescriptive provision, with these matters being considered as part of an assessment of fairness. For example, some uses of copyright material are less likely to be fair, if the author or owner of the copyright material is not acknowledged. In this way, fair use accords with the first framing principle, ‘acknowledging and respecting authorship’.

4.38 Fair use builds on Australia’s current fair dealing exceptions, retaining the focus on fairness, but removing unnecessary limitations to particular types of use and clarifying that important factors should be considered when assessing whether any type of use is fair.

37 The fairness factors specified for research and study (ss 40, 103C) are likely to be relevant when considering the fairness of dealings for other purposes: Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), [4.09]. See further Ch 5.

38 The fair dealing provisions for the purpose of criticism or review, and those for the purpose of, or associated with, the reporting of news in a newspaper, magazine or similar periodical contain an additional requirement for a ‘sufficient acknowledgment’ of the work or audio-visual item: *Copyright Act 1968* (Cth) ss 41 and 103A (criticism or review); ss 42(1)(a) and 103B(1)(a) (reporting news).

39 See *Ibid* s 40(3)–(8) (research or study).

40 *Ibid* ss 10, 40, 135ZMDA.

Fair use is flexible and technology-neutral

4.39 Fair use is a standard, rather than a rule. It requires the consideration of principles or factors in an assessment of fairness, rather than setting out in detail the precise circumstances in which the exception will apply. This makes fair use considerably more flexible and better able to adapt to new technologies and new commercial and consumer practices. It is an important feature and benefit of both fair use and, to a lesser extent, fair dealing exceptions, including the new fair dealing exception recommended in Chapter 6. It is also consistent with the fourth framing principle—‘providing rules that are flexible, clear and adaptive to new technologies’.

4.40 New technologies, services and uses emerge over time—rapidly in the digital environment. Many submissions suggested that a broad, principles-based exception, which employs technology-neutral drafting such as fair use, would be more responsive to rapid technological change and other associated developments than the current specific, closed-list approach to exceptions.⁴¹

4.41 A technology-neutral open standard such as fair use has the dynamism or agility to respond to ‘future technologies, economies and circumstances—that don’t yet exist, or haven’t yet been foreseen’.⁴² That is, fair use may go some way to futureproof the *Copyright Act*.⁴³ As the Law Council of Australia saw it, a flexible fair use provision ‘will enable the Act to adapt to changing technologies and uses without the need for legislative intervention’.⁴⁴

4.42 Fair use is also better able to respond to the challenges of convergence. The Convergence Review recommended:

a shift towards principles-based legislation to ensure the policy framework can respond to the future challenges of convergence ... [A] principles-based approach would provide increased transparency for industry and users [and] moves away from detailed ‘black-letter law’ regulation, which can quickly become obsolete in a fast-changing converged environment and is open to unforeseen interpretations.⁴⁵

41 See, eg, Internet Industry Association, *Submission 744*; NSW Government and Art Gallery of NSW, *Submission 740*; Optus, *Submission 725*; ACCC, *Submission 658*; Telstra Corporation Limited, *Submission 602*; Google, *Submission 600*; BSA, *Submission 598*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; Yahoo!7, *Submission 276*.

42 Telstra Corporation Limited, *Submission 222*. See also R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Law Institute of Victoria, *Submission 198*.

43 Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*; ABC, *Submission 210*.

44 Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*. See also Choice, *Submission 745*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

45 Australian Government Convergence Review, *Convergence Review Final Report* (2012), Executive Summary, xii.

4.43 eBay submitted that a principles-based approach is ‘likely to lessen the need to make ongoing statutory amendments in order to accommodate changing user expectations’.⁴⁶ Choice commented similarly:

Fair use is best equipped to address use of works on social media precisely because it is so nuanced. A rigid set of exceptions or limitations would be ill equipped to find the right balance for the various interests at play, and would be likely to age quickly.⁴⁷

4.44 Many stakeholders suggested that specific exceptions will inevitably reflect the circumstances that prevailed at the time of their enactment, while a general exception can respond to a changing environment. Telstra noted:

the current exceptions are generally created in response to existing technologies, economies and circumstances. As a result, they tend to have a narrow ‘patchwork’ application to circumstances existing at the time the exception is introduced.⁴⁸

4.45 Yahoo!7 submitted that ‘the existing exceptions under the Act are no longer sufficient by themselves to protect and support the new services introduced by Internet and technology companies’.⁴⁹ For example:

In Australia, the absence of a robust principle of fair use within the existing fair dealing exceptions means that digital platforms offering search tools are not able to provide real time high quality communication, analysis and search services with protection under law.⁵⁰

4.46 Stakeholders were also concerned about the lengthy delay between the emergence of a new use and the legislature’s consideration of the need for a specific exception.⁵¹ At present, ‘each new situation needs to be considered and dealt with in separate amending legislation which usually occurs well after the need is identified’.⁵² A copyright exception permitting time shifting was not enacted in Australia until 22 years after time shifting had been found to be fair use in the US. The exception for parody and satire came 12 years later, and for reverse engineering of computer programs, seven years.⁵³ Electronic Frontiers Australia submitted that the inflexibility of the current purpose-based exceptions, together with the increasingly rapid pace of technological change, ensure that ‘the law now lags years behind the current state of innovation in technology and service delivery’.⁵⁴

46 eBay, *Submission 751*.

47 Choice, *Submission 745*.

48 Telstra Corporation Limited, *Submission 222*.

49 Yahoo!7, *Submission 276*.

50 Ibid.

51 For example, Intellectual Property Committee, Law Council of Australia, *Submission 284*; Yahoo!7, *Submission 276*; Law Council of Australia, *Submission 263*; R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Google, *Submission 217*.

52 Intellectual Property Committee, Law Council of Australia, *Submission 284*; Law Council of Australia, *Submission 263*.

53 Time shifting: *Sony Corp of America v Universal City Studios, Inc* (1984) 464 US 417 and *Copyright Act 1968* (Cth) s 110AA; parody: *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569 and *Copyright Act 1968* (Cth) ss 41A, 103AA; reverse engineering: *Sega Enterprises v Accolade Inc* (1992) 977 F.2d 1510 and *Copyright Act 1968* (Cth) s 47D. See further R Giblin, *Submission 251*.

54 EFA, *Submission 258*.

4.47 One submission noted that policy makers ‘simply cannot be expected to identify and define *ex ante* all of the precise circumstances in which an exception should be available’.⁵⁵ It was said that no legislature can anticipate or predict the future. Google submitted that ‘innovation and culture are inherently dynamic’ and that ‘you cannot legislate detailed rules to regulate dynamic situations; you can only set forth guiding principles’.⁵⁶

4.48 With a fair use standard, innovation and other new expressive purposes need not wait for Parliament to reconsider the appropriate scope of copyright exceptions. Australian Film/TV Bodies noted that Australia has implemented specific provisions in almost every major policy area resolved by fair use litigation in the US, and suggested that this indicates that the existing provisions are working.⁵⁷ However, they did not mention the extensive time lag between the US fair use decisions and the Australian amendments. Fair use will save the legislature from constant law reform to ‘catch up’ with new technologies and uses, although of course the legislature could still act if needed to respond to particular developments.

4.49 Some stakeholders argued that the legislature—and not the judiciary—should determine the scope of the exceptions.⁵⁸ They considered that important decisions such as whether a new purpose is fair should be decided by Parliament, because parliamentary processes allow public consideration of community priorities, and create an opportunity for public scrutiny and debate.⁵⁹ By contrast, judicial decision making in this context was seen as less democratic, as only the views of the parties are presented to the court,⁶⁰ and the ‘economic strength of litigants is unduly significant’.⁶¹ One stakeholder thought that ‘Australian courts will struggle to determine how to give content to an open ended defence’.⁶²

4.50 The ALRC agrees that standards do place a greater emphasis on judicial decision making. However, in this area of the law, the better role for Parliament is to set out the principles on which decisions should be made. The application of principles to specific fact situations is the role of the courts. Chapter 5 of this Report discusses how courts will perform this function in a way that contributes to certainty and predictability.

55 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

56 Google, *Submission 217*. See also Yahoo!7, *Submission 276*.

57 Australian Film/TV Bodies, *Submission 739*.

58 See, eg, Free TV Australia, *Submission 865*; ABC, *Submission 775*; ARIA, *Submission 731*; Copyright Agency, *Submission 727*; Cricket Australia, *Submission 700*; Australian Institute of Architects, *Submission 678*; Australian Copyright Council, *Submission 654*; Screenrights, *Submission 646*; APRA/AMCOS, *Submission 247*; Australian Publishers Association, *Submission 225*; NSW Young Lawyers, *Submission 195*.

59 ABC, *Submission 775*; Australian Institute of Architects, *Submission 678*.

60 ABC, *Submission 775*; Arts Law Centre of Australia, *Submission 706*; Screenrights, *Submission 646*.

61 Australian Institute of Architects, *Submission 678*.

62 Australian Film/TV Bodies, *Submission 739*. See also ARIA, *Submission 731*.

4.51 Some stakeholders queried the argument that fair use provides flexibility to respond to changing conditions.⁶³ The Viscopy Board stated that copyright law in the US is ‘regularly under review by the legislature in spite of their longstanding fair use provision’.⁶⁴ Others said there was no need for greater flexibility, and that more flexibility comes at too high a cost. Some submitted that the existing fair dealing defences were sufficiently flexible to respond to technological change.⁶⁵

4.52 Fair dealing exceptions are generally more flexible than specific prescribed exceptions—like fair use, they need not be confined to particular technologies and they require a consideration of fairness, in light of a set of principles. But fair dealing exceptions, including the new fair dealing exception recommended in this Report as an alternative to fair use, are confined to uses of copyright material for prescribed purposes.

4.53 For many stakeholders, closed-ended fair dealing exceptions are too confined and inflexible. For example, the CSIRO submitted that it was not always clear whether some activities were for ‘research or study’, one of the prescribed fair dealing purposes, and that this can mean

uses that facilitate dissemination and communication of scientific and technical information may be avoided despite there being no or marginal impact on the legitimate interests of a copyright owner. If a more general purpose exception applied this concern may be alleviated, the focus then being on the key issue of the impact of the use on the legitimate interests of the copyright owner.⁶⁶

Rules and standards

4.54 The flexibility of fair use largely comes from the fact that it is a standard, rather than a rule. This distinction between rules and standards is commonly drawn in legal theory. Rules are more specific and prescribed. Standards are more flexible and allow decisions to be made at the time of application, and with respect to a concrete set of facts.⁶⁷ Further, ‘standards are often based on concepts that are readily accessible to non-experts’.⁶⁸

4.55 Rules and standards are, however, points on a spectrum. Rules are ‘not infinitely precise, and standards not infinitely vague’.⁶⁹ The legal philosopher H L A Hart wrote that rules have ‘a core of certainty and a penumbra of doubt’.⁷⁰ The distinction is nevertheless useful.⁷¹

63 Foxtel, *Submission 748*; Australian Education Union, *Submission 722*; Queensland Law Society, *Submission 644*; Springer Science and Business Media, *Submission 639*; Viscopy Board, *Submission 638*.

64 For example, Viscopy Board, *Submission 638*.

65 APRA/AMCOS, *Submission 664*.

66 CSIRO, *Submission 242*.

67 F Schauer, ‘The Convergence of Rules and Standards’ (2003) (3) *New Zealand Law Review* 303.

68 E Hudson, ‘Implementing Fair Use in Copyright Law’ (2013) 25 *Intellectual Property Journal* 201, 220.

69 F Schauer, ‘The Convergence of Rules and Standards’ (2003) (3) *New Zealand Law Review* 303, 309.

70 H Hart, *The Concept of Law* (3rd ed, 2012) 123.

71 See also E Hudson, ‘Implementing Fair Use in Copyright Law’ (2013) 25 *Intellectual Property Journal* 201 who uses a standards and rules analysis to revisit some of the claims about the merits of different styles of drafting of copyright exceptions.

4.56 Another way of talking about standards is to refer to ‘principles-based’ legislation. In 2002, a study by Australian academic Professor John Braithwaite concluded that, as between principles and rules:

1. When the type of action to be regulated is simple, stable and does not involve huge economic interests, rules tend to regulate with greater certainty than principles.
2. When the type of action to be regulated is complex, changing and involves large economic interests:
 - (a) Principles tend to regulate with greater certainty than rules;
 - (b) Binding principles backing non-binding rules tend to regulate with greater certainty than principles alone;
 - (c) Binding principles backing non-binding rules are more certain still if they are embedded in institutions of regulatory conversation that foster shared responsibilities.⁷²

4.57 Standards are becoming more common in Australian law, including, for example, in consumer protection and privacy legislation. As Universities Australia submitted, there is ‘nothing new or novel about courts construing open-ended standards such as fairness’.⁷³

4.58 The well-known prohibition on ‘misleading or deceptive conduct’, previously in s 52 of the *Trade Practices Act 1974* (Cth) and now contained in s 18 of the Australian Consumer Law,⁷⁴ is an example of this kind of legislative drafting—that is, providing a broad standard that can be applied flexibly to a multitude of possible situations.

4.59 Similarly, the unfair contracts provisions of the Australian Consumer Law provide a simple formulation of when a term of a consumer contract is ‘unfair’. Under that law, a term is unfair when:

- (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.⁷⁵

4.60 Such standards are sometimes accompanied by factors a court may, or must, take into account in applying the standard, or examples of when the standard may have been breached, or complied with.

72 J Braithwaite, ‘Rules and Principles: A Theory of Legal Certainty’ (2002) 27 *Australian Journal of Legal Philosophy* 47, 75.

73 Universities Australia, *Submission 754*.

74 *Competition and Consumer Act 2010* (Cth) sch 2, s 18.

75 *Ibid* sch 2, s 24(1).

4.61 Again, the Australian Consumer Law provides illustrations of these approaches. The unconscionable conduct provisions contain an extensive, but non-exhaustive, list of factors to which a court may have regard in determining unconscionable conduct.⁷⁶ The unfair contracts provisions contain examples of unfair terms.⁷⁷

4.62 In another field, the *Privacy Act 1988* (Cth) is an example of principles-based legislation. The National Privacy Principles and Information Privacy Principles provide the basis for regulating the handling of personal information by private sector organisations and public sector agencies.⁷⁸ The principles provide broad standards, such as obligations: not to collect personal information unless the information is ‘necessary’; not to use personal information other than for the ‘primary purpose’ of collection; and to take ‘reasonable steps’ to protect personal information from misuse.

4.63 Principles-based regulation was considered the best approach to regulating privacy for several reasons, including that principles have greater flexibility in comparison to rules. That is, being high-level, technology-neutral and generally non-prescriptive, principles are capable of application to all agencies and organisations subject to the *Privacy Act*, and to the myriad of ways personal information is handled in Australia. Further, principles allow for a greater degree of futureproofing and enable the regulatory system to respond to new issues as they arise without having to create new rules.⁷⁹ In the ALRC’s view, these rationales can also be seen as applying to the concept of fair use in copyright law.

4.64 The introduction of fair use is consistent with these current approaches to best practice principles-based regulation.

Fair use promotes public interest and transformative uses

4.65 Copyright has always been concerned with promoting the public interest. The first copyright statute, the *Statute of Anne*, was ‘an Act for the encouragement of learning ... and for the encouragement of learned men to compose and write useful books’.⁸⁰ The monopoly granted was not only to preserve the property rights of the publishers, but to ensure that useful books were written for the public to read. The preamble to the *World Intellectual Property Organization Copyright Treaty* recognised ‘the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the *Berne Convention*’.⁸¹ The third framing principle for this Inquiry requires recommendations to ‘promote fair access to content’.

76 Ibid sch 2, s 22.

77 Ibid sch 2, s 25.

78 From 12 March 2014, the Australian Privacy Principles will replace the National Privacy Principles and Information Privacy Principles: *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

79 See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

80 1710, 8 Anne c 19.

81 *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002).

4.66 It has been said that fair use ‘counterbalances what would otherwise be an unreasonably broad grant of rights to authors and unduly narrow set of negotiated exceptions and limitations’.⁸² In the words of one group of commentators:

Given expansions to owner rights, the inclusion of ‘large and liberal’ exceptions in copyright legislation is essential to promote important public interest values associated with research and education, access to information, new authorship, fair competition, technological and scientific progress, and cultural, economic and social development.⁸³

4.67 One of the notable public interests that fair use will arguably better serve is education. Parts of the educational sector called for a ‘fairer’ policy balance in the *Copyright Act*.⁸⁴ Copyright Advisory Group (CAG) Schools compiled a table comparing a number of differences between the copyright laws that apply to schools in Australia, the US and Canada and submitted that the results suggest that the ‘balance struck in the Australian *Copyright Act* does not adequately recognise the public interest in allowing limited free uses of copyright materials for educational purposes’.⁸⁵

4.68 Universities Australia stated that Australian universities were in a ‘worse position’ than large commercial enterprises in terms of being able to use third party copyright material for socially beneficial purposes.⁸⁶ Commercial news organisations can rely upon the fair dealing exceptions for news reporting but there is no equivalent specific exception for universities for fair use for educational purposes. Universities Australia submitted that, from a policy perspective, ‘this makes little sense’.⁸⁷

4.69 The 2013 *Google Books* case demonstrates the potential of fair use to advance education and learning and to benefit authors and content owners.⁸⁸ Google scanned books and made them available for searching on its website, without seeking rights holders’ permission. A search in Google Books returns a list of books in which the search term appears, a ‘snippet’ (one eighth of a page) from the book, and links to sellers of the books and libraries. In the judgment, the benefits of Google Books were said to be ‘a new and efficient way for readers and researchers to find books’, the facilitation of data and text mining, access for people with print disability, the preservation of old and out of print books, and (because the search results include links to book sellers) increased sales for authors and publishers.⁸⁹ The court concluded that the use was transformative, served educational purposes, and did not serve as a market replacement for books, but in fact enhanced the sales of books, and was therefore fair use.

82 ADA and ALCC, *Submission 213*, citing P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537, 2618.

83 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

84 See, eg, Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*.

85 Copyright Advisory Group—Schools, *Submission 231*. See also arguments made in Copyright Advisory Group—Schools, *Submission 707*.

86 Universities Australia, *Submission 754*.

87 *Ibid.*

88 *The Authors Guild, Inc. v Google, Inc.*, (SDNY, Civ 8136, 14 November 2013).

89 *Ibid.*

4.70 There will be debate about this decision and an appeal is likely. However, it is important to note that under current Australian law, Google would have been very limited in its ability to establish such a database—even though it does not appear to undermine the position of rights holders. Under fair use, there is scope to use copyright material in an innovative way that can serve the public interest while respecting markets.

4.71 Fair use also promotes, and Australia’s current exceptions now largely neglect, what have been called ‘transformative’ uses. As discussed in Chapter 5, this refers to the use of copyright material for a different purpose than the use for which the material was created.

4.72 This is a powerful and flexible feature of fair use. It can allow the unlicensed use of copyright material for such purposes as criticism and review, parody and satire, reporting the news and quotation. Many of these uses not only have public benefits, but they generally do not harm rights holders’ markets, and sometimes even enlarge them. Fair use is also an appropriate tool to assess whether other transformative uses should be permitted without a licence, such as data mining and text mining, caching, indexing and other technical functions, and a range of other innovative uses.

4.73 The monopoly provided by copyright is vital to allowing creators and rights holders to exploit the value of their works, so as to increase the incentive to create those works—but this monopoly need not extend indefinitely or into markets which the creator had no real interest in exploiting. Copyright must leave ‘breathing room’ for new works and new productive uses that make use of other copyright material.

4.74 This Report discusses the merits of permitting a range of unlicensed uses of copyright material—uses that the ALRC considers benefit the public and neither harm rights holders nor reduce the incentive to create. The following examples of such uses that Australia’s current exceptions may unnecessarily prohibit or stifle were provided by stakeholders:⁹⁰

- accessible formats of texts for blind or vision impaired persons;
- caching and indexing by search engines and internet service providers;
- the sparing and appropriate incorporation of third party copyright material into educational course content delivered via massive open online courses (MOOCs);
- placing development applications, including architects’ plans, surveys, and environmental impact statements, on a website for the purpose of public consultation;

90 Examples were provided by many stakeholders, including: Universities Australia, *Submission 754*; NSW Government, *Submission 294*; Intellectual Property Committee, Law Council of Australia, *Submission 284*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Law Council of Australia, *Submission 263*; Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208*; Vision Australia, *Submission 181*; State Library of New South Wales, *Submission 168*; Blind Citizens Australia, *Submission 157*; National Archives of Australia, *Submission 155*; Powerhouse Museum, *Submission 137*; M Rimmer, *Submission 122*.

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- the communication to the public of the datasets underlying research results that could assist in independent verification of those results, particularly for online qualitative research;
 - use of copyright material with no owner that can be identified—known as ‘orphan works’;
 - use of technologies that analyse copyright material looking for patterns and trends—known as ‘data mining’;
 - copying legally acquired copyright material between computers and other devices for personal use;
 - storing legally acquired copyright material on remote servers;
 - using material to satisfy personal curiosity, rather than to undertake formal research;
 - the communication to the public of works created by students and researchers using museum collections;
 - use of third party images or text in a presentation to illustrate the point being made;
 - use of short quotations in academic publications;
 - a university’s creation of an open digital repository of theses and other research publications;
 - sharing copyright works with colleagues for the purpose of discussion, including a university’s reproduction and distribution of reference material to a research team;
 - the use by a student of extracts from a state Hansard or state government media releases in a play;
 - the reproduction of a passage from a book in a review of a film based on the book;
 - copying portions of a confidential document, such as a Cabinet minute, for the purpose of commenting on a matter of public importance;
 - use of material to support commentary or the expression of opinion rather than reporting of events—for example, humorous topical news programmes or some types of newspaper opinion piece;
 - some practices that go beyond parody or satire, such as pastiche or caricature;
 - professional legal or law-related services such as preparing and executing agreements, preparation of trade mark or patent applications, mediation, alternative dispute resolution, or arbitration;
 - 3D printing; and
 - copying for the purpose of back-up and data recovery.

Fair use assists innovation

4.75 Exceptions such as fair use that are flexible and technology-neutral can stimulate innovation, particularly in ‘transformative markets’—that is, markets that rights holders do not traditionally exploit, but that may nevertheless include the use of copyright material.

4.76 Australia has been called a ‘hostile regulatory environment for technology innovators and investors’.⁹¹ This has been said to have ‘long discouraged innovation and investment by technology providers and content owners alike’.⁹²

4.77 Increasingly, the introduction of fair use into copyright law is being looked to as something that innovative, technology-focused countries have adopted and it is gaining support across Europe.⁹³

4.78 The Australian Industry Group submitted that the current *Copyright Act* does not provide the optimal foundation for Australia to succeed in the digital economy, and supported the ALRC’s movement towards a more flexible and less technology specific model for copyright law.⁹⁴

4.79 Yahoo!7 submitted:

Under Australia’s existing copyright regime, very many socially useful and economically beneficial technological innovations would simply have no breathing space to emerge. They would be blocked at the first post by a copyright regime that is insufficiently flexible to accommodate technological innovation.⁹⁵

4.80 Yahoo!7 provided an example of a technology that was ‘only possible due to the flexibility offered by the US copyright regime’.⁹⁶ One of its innovative mobile applications reproduces less than two seconds of the audio stream of a television program that a user is watching and matches that thumbprint against a database of thumbprints in order to inform the user what program they are watching.

4.81 Universities Australia referred to a LexisNexis commercial database which uses legal briefs and motions filed with US courts. The marketing to lawyers is that this product will enable them to ‘research how other litigators have framed similar, successful arguments’ and to ‘gain a better understanding of emerging issues or unfamiliar areas of law’.⁹⁷ Universities Australia submitted that the publisher could ‘not have created this useful research tool in Australia: it needed a fair use exception to do so’.⁹⁸

91 R Giblin, *Submission 251*.

92 *Ibid.*

93 I Hargreaves and B Hugenholtz, ‘Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework’ (2013) 13 *Lisbon Council Policy Brief* 1, 4.

94 Australian Industry Group, *Submission 728*.

95 Yahoo!7, *Submission 276*.

96 *Ibid.*

97 Universities Australia, *Submission 754*.

98 *Ibid.*

4.82 Similarly, Google stated that it could not have created and started its search engine in Australia under the current copyright framework, as ‘innovation depends on a legal regime that allows for new, unforeseen technologies’.⁹⁹ The AIMIA Digital Policy Group noted the adverse effect that the Australian copyright regime was having on the Australian digital industry’s ability to innovate and compete globally.¹⁰⁰ Other stakeholders shared the view that the current copyright regime puts Australian companies, universities, schools and individuals at a disadvantage compared with those in the US, or other countries that have a fair use exception.¹⁰¹

4.83 Universities Australia submitted that Australian copyright law is limiting the way Australian universities can deliver course content via MOOCs¹⁰² and take advantage of text and data technologies in research.¹⁰³ In its view, Australian universities are at a comparative disadvantage to their counterparts in fair use jurisdictions in this respect. It asked, ‘[w]ho knows what new technologies will emerge in the years and decades to come that would be blocked by inflexible copyright exceptions?’¹⁰⁴

4.84 Some stakeholders said that the current legal arrangements are not impeding innovation, pointing to the ‘rapid and continued growth of the digital economy in Australia’.¹⁰⁵ A number of submissions noted that the technology sector, companies such as Google and Facebook, and start-ups, are operating or even ‘thriving’ in Australia under existing copyright laws.¹⁰⁶ The Australian Film/TV Bodies submitted that:

The list of innovative online platforms that have successfully launched in Australia, and which operate free of any active threats of litigation, is extensive and continuing to grow while the Inquiry is taking place.¹⁰⁷

4.85 The ALRC considers that it is not sufficient that innovative businesses ‘operate free of active threats of litigation’. They should be able to operate confident in the knowledge that they may use copyright material, if that use is fair.

4.86 The Law Institute of Victoria considered that fair use ‘would promote a framework to encourage innovation and investment in technological development in Australia’.¹⁰⁸ eBay submitted that a fair use exception ‘would enhance the environment for e-commerce in Australia’,¹⁰⁹ and both Google and Yahoo!7 considered that a

99 Google, *Submission 217*.

100 AIMIA Digital Policy Group, *Submission 261*.

101 See, eg, Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*; Universities Australia, *Submission 246*; Google, *Submission 217*.

102 A point also made by Copyright Advisory Group—Schools, *Submission 707*.

103 See Ch 11 for a discussion of text and data mining.

104 Universities Australia, *Submission 754*.

105 For example Cricket Australia, *Submission 700*.

106 For example, Foxtel, *Submission 748*; Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*; Foxtel, *Submission 245*.

107 Australian Film/TV Bodies, *Submission 739*.

108 Law Institute of Victoria, *Submission 198*.

109 eBay, *Submission 93*.

regime based upon a flexible, broad, principles-based exception would assist local start-ups:¹¹⁰

Application development can thrive in Australia if there is a broader approach to how content can be used by others while still ensuring that such use does not deprive the rights holder of a legitimate revenue stream or impact the market value of the underlying work. Given the relatively low barrier of entry to the digital innovation marketplace, it would also provide software and application developers the ideal regulatory environment to capitalize on the roll-out of the National Broadband Network.¹¹¹

4.87 CAG Schools stated:

The flexibility of the fair use exception in the US has in effect operated as innovation policy within the copyright system because it creates incentives to build innovative products, which yield complementary technologies that enhance the value of the copyright works.¹¹²

4.88 The ACCC submitted that flexible regulations can help avoid unnecessarily ‘curtailing innovation and the creation of new copyright material’.¹¹³ Another stakeholder submitted that there is ‘real world evidence that fair use is economically advantageous’.¹¹⁴

The copyright industries in the United States remain without peer. These industries have achieved global dominance against the backdrop of a domestic fair use defence. It is, of course, possible that this has occurred despite—rather than with the assistance of—fair use, but it is down to opponents of fair use to make this case.¹¹⁵

4.89 In contrast, ARIA argued that fair use has only played a minor role in supporting innovation in the US, noting fair use has been successfully invoked to permit innovative technological uses in only a few cases.¹¹⁶

4.90 An advantage of fair use, however, is that a person wishing to make an innovative use of copyright material does not need to ask the permission of the court, or the rights holder—as long as the use is fair. There are many innovative uses that have never been the subject of litigation in the US or in Australia. But in Australia, if infringement proceedings were commenced, the user would not be able to argue that the use was fair (unless it was within one of the existing fair dealing purposes).

4.91 The conditions for innovation ‘depend on much more than the details of copyright law, including everything from tax law to the availability of an educated workforce to matters of business culture’.¹¹⁷ Nevertheless, an appropriate regulatory framework is a key aspect of promoting innovation. The ALRC considers that the

110 Yahoo!7, *Submission 276*; Google, *Submission 217*.

111 Yahoo!7, *Submission 276*.

112 Copyright Advisory Group—Schools, *Submission 231* citing Fred von Lohmann, ‘Fair Use as Innovation Policy’ (2008) 23 *Berkeley Technology Law Journal* 289.

113 ACCC, *Submission 165*.

114 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

115 *Ibid.*

116 ARIA, *Submission 731*.

117 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

enactment of fair use would contribute to such an environment and help make Australia a more attractive market for technology investment and innovation.

4.92 The Hargreaves Review stated that, while the economic benefits of fair use ‘may sometimes have been overstated’, intellectual property issues are important for the success of innovative, high technology businesses.¹¹⁸ The Hargreaves Review considered that the ‘very protracted political negotiations’,¹¹⁹ that would be necessary to introduce fair use in the UK, given the constraints of EU law, made it unfeasible. This does not detract from the substantive merits of fair use for Australia.

4.93 Professor Hargreaves has written subsequently that fair use ‘has proven the backbone of a healthy Internet-economy ecosystem in the US’ and also observed that ‘several technologically ambitious small countries, including Israel, Singapore and South Korea’ have adopted a version of fair use.¹²⁰

4.94 Some stakeholders submitted that the argument that fair use assists innovation takes a narrow view,¹²¹ and fails to recognise rights holders’ innovations,¹²² licensing opportunities,¹²³ innovations that are occurring which are not reliant on fair use,¹²⁴ the economic contribution of the creative industries,¹²⁵ and ‘the need for such innovations to be protected by strong and predictable copyright laws’.¹²⁶

4.95 Overly broad copyright exceptions can arguably undermine the incentive not only to create, but to publish and distribute on new platforms and in other innovative ways. The digital environment presents new ways for rights holders to exploit their material; if rights holders benefit from these new digital business models, this should stimulate further creativity.

4.96 Copyright assists innovation by giving rights holders a limited monopoly, thereby increasing the incentive to create, publish and distribute their material. The confidence that rights holders will be able to exploit their rights is therefore also important to innovation. If rights holders are unsure whether they will be able to exploit their rights exclusively, this could inhibit creation and distribution. Certainty has been called ‘the cornerstone for encouraging business investment and innovation’.¹²⁷ A number of stakeholders submitted that the uncertainty of fair use

118 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), [5.16], [5.17].
 119 Ibid, [5.18].
 120 I Hargreaves and B Hugenholtz, ‘Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework’ (2013) 13 *Lisbon Council Policy Brief* 1, 4.
 121 SPAA, *Submission 768*; Viscopy Board, *Submission 638*; Australian Publishers Association, *Submission 629*; Motion Picture Association of America Inc, *Submission 573*.
 122 Foxtel, *Submission 748*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*. The Irish Review heard argument to similar effect: Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 32.
 123 Viscopy Board, *Submission 638*.
 124 Foxtel, *Submission 748*; Viscopy Board, *Submission 638* (citing the Google Art Project).
 125 Copyright Agency, *Submission 727*; Australian Publishers Association, *Submission 629*; AIPP, *Submission 564*.
 126 Cricket Australia, *Submission 700*. See also Foxtel, *Submission 748*.
 127 COMPPS, *Submission 634*.

would be a disincentive to innovation.¹²⁸ NAVA said it could ‘kill off the golden goose’.¹²⁹

4.97 The ALRC considers that fair use is sufficiently certain to ensure rights holders are confident that they will be able to exploit their rights, and so to stimulate creation. It has long been recognised that the copyright monopoly must have its limits, in order to avoid restricting the creation of new works.

4.98 Further, as noted in Chapter 3, by limiting the copyright monopoly, exceptions can also increase competition and stimulate innovation more generally, including in technologies and services that make productive use of copyright material. The ALRC considers that fair use finds the right balance. It protects the interests of rights holders, so that they are rewarded and motivated to create, in part by discouraging unfair uses that harm their traditional markets. But importantly, fair use also promotes ‘transformative uses’. Many of the innovative uses discussed above—uses that many argue are fair and should not require a licence—are ‘transformative uses’ that operate in ‘transformative markets’. As discussed above, fair use promotes transformative use, as well as important public interest uses.

Fair use better aligns with reasonable consumer expectations

4.99 Fair use will mean that ordinary Australians are not infringing copyright when they use copyright material in entirely harmless ways that in no way damage—and may even benefit—the market of rights holders. This aligns better with consumer expectations. The public is more likely to understand fair use than the existing collection of complex specific exceptions; the exception will seem more reasonable; and this may even increase respect for and compliance with copyright laws more broadly.¹³⁰

4.100 The Hargreaves Review identified the ‘growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people’ as a ‘significant problem’.¹³¹ A number of stakeholders in this Inquiry held similar views.¹³² The mismatch was said to be undermining the copyright system and bringing the law into disrepute.¹³³

128 Flemish Book Publishers Association, *Submission 683*; Music Council of Australia, *Submission 647*; Queensland Law Society, *Submission 644*; Motion Picture Association of America Inc, *Submission 573*; British Copyright Council, *Submission 563*; ALPSP, *Submission 562*.

129 NAVA, *Submission 655*. See also ARIA, *Submission 731*.

130 Choice, *Submission 745*; IP Australia, *Submission 681*; ACCAN, *Submission 673*; Cyberspace Law and Policy Centre, *Submission 640*; Google, *Submission 217*.

131 I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), [5.10].

132 Choice, *Submission 745*; EFA, *Submission 714*; EFA, *Submission 258*; Google, *Submission 217*.

133 Choice, *Submission 745*; Google, *Submission 217*. See also EFA, *Submission 714*; EFA, *Submission 258*.

4.101 More recently, the Copyright Review Committee (Ireland) commented that

Accommodating basic and genuine user expectations alongside the legitimate interests of rights owners makes copyright law stable and sustainable, thereby contributing generally to cultural and economic development and innovation.¹³⁴

4.102 Some submissions gave examples of common practices which run foul of the law but which consumers may mistakenly consider to be lawful and which, arguably, are unlikely to harm copyright holders. For example, consumers expect to be able to post a photo of goods on eBay in order to sell them. However, eBay stated that those using its services may infringe copyright when the photograph includes an artistic work on the cover of a book or a garment bearing an artwork.¹³⁵ In its view, a copyright owner does not suffer loss or damage in such a case. It submitted that within its business, and ‘a wide range of markets’, a fair use exception would provide ‘an opportunity to prevent the occurrence of repeated technical infringement of copyright’.¹³⁶

4.103 Similarly, Kay & Hughes submitted:

the use of images of artistic works to advertise the resale of [those] artworks on the secondary market is, our clients would submit, exactly the kind of non-competing, good-faith, legitimate use of copyright that statutory exceptions (including fair use) are designed to protect.¹³⁷

4.104 The Viscopy Board observed that Viscopy has offered licences for ‘many years’ to cover the sort of use referred to by eBay.¹³⁸ However, some stakeholders view arrangements of this type as ‘rent seeking’ or similar.¹³⁹ Speaking in the context of consumer technologies and licensing, Choice stated that ‘the right of creators to be commercially rewarded for their works is not the same as a right to endless commercial exploitation of a work’:

Just because a creator *can* charge a consumer to copy a CD to a smartphone doesn’t mean that they have the irrevocable right to do so. Restricting a practice such as this would not undermine the market for the work, as a consumer would have to buy it in the first instance.¹⁴⁰

4.105 This is not an argument for legalising piracy. Choice noted that infringing activities, such as piracy, create the least confusion for Australian consumers. That is, consumers do not generally expect the law to allow free copying of music, television and movies. By contrast, the survey results suggest that there was greater confusion about activities which are currently illegal but which could potentially become legal

134 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 59.

135 eBay, *Submission 93*. See also Viscopy Board, *Submission 638*.

136 eBay, *Submission 93*.

137 Kay and Hughes, *Submission 631*.

138 Viscopy Board, *Submission 638*.

139 Kay and Hughes, *Submission 631*: ‘our clients have raised concerns that some Dealers are exercising their power as the Agent of an Artist, and resulting ability to withhold consent for publication of artistic works in auction catalogues in a potentially anti-competitive, manipulative or restrictive manner, outside of the intentions of the *Copyright Act*’.

140 Choice, *Submission 745*.

under a fair use exception—for example, copying a (legally acquired) video to a personally owned device. Choice observed that ‘the large number of consumers that do not know, or incorrectly identify, the legality of uses which are currently illegal in Australia is evidence of our out-dated and restrictive copyright laws’.¹⁴¹

4.106 Some stakeholders raised concerns that introducing fair use would serve to normalise and increase infringing conduct.¹⁴² Like the claim that fair use would improve respect for copyright law, these matters are difficult to measure or test. The ALRC expects that the introduction of a fair use test would be accompanied by efforts to educate consumers about fair use. Public education is easier when the law is coherent, internally consistent and reasonable.¹⁴³

4.107 The ALRC agrees that consumer expectations are sometimes unreasonable, or based on a poor understanding of copyright law.¹⁴⁴ Fair use does not align with the expectations of those consumers who want to get their music, television, and movies for free.

4.108 Some stakeholders noted that the market can, and is, providing services that meet legitimate consumer expectations.¹⁴⁵ For example, Foxtel submitted that it was already offering its customers access to copyright material on flexible terms that meet its customers’ reasonable expectations.¹⁴⁶ As noted earlier, the effect of a use on a market is a highly significant factor in determining fair use. Content providers can have a substantial effect on the scope of fair use, by responding to market demand.

Fair use helps protect rights holders’ markets

4.109 Fair use explicitly recognises the need to protect rights holders’ markets. When determining whether a particular use is fair, under fair use and fair dealing exceptions, consideration must be given to ‘the effect of the use upon the potential market for, or value of, the copyright material’. Considering this factor will help ensure that the legitimate interests of creators and other rights holders are not harmed by the introduction of fair use.¹⁴⁷ If a licence can be obtained for a particular use of copyright material, then the unlicensed use of that material will often not be fair. This is vital to ensuring copyright law continues to fulfil its primary purpose in providing creators with sufficient incentive to create.

141 Ibid.

142 Foxtel, *Submission 748*; AFL, *Submission 717*; Pearson Australia, *Submission 645*; Combined Newspapers and Magazines Copyright Committee, *Submission 619*; Thomson Reuters, *Submission 592*.

143 Cyberspace Law and Policy Centre, *Submission 640*; Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208*.

144 Copyright Agency, *Submission 727*; Viscopy Board, *Submission 638*.

145 Foxtel, *Submission 748*; Copyright Agency, *Submission 727*.

146 Foxtel, *Submission 748*.

147 See Ch 2, second framing principle.

4.110 Many rights holders and others submitted that the introduction of fair use to Australia would harm rights holders' interests.¹⁴⁸ Fair use was said to reduce the scope of rights, undermine the ability to control how content is used, and undermine licensing arrangements and other revenue streams.¹⁴⁹

4.111 Particular concerns were expressed with respect to the likely harm to creators¹⁵⁰ such as artists,¹⁵¹ and book publishers¹⁵²—particularly small and medium-sized publishers.¹⁵³ Sporting organisations also submitted that copyright is a crucial source of their funding.¹⁵⁴ Others were concerned that some users would assert 'an implausible fair use defence in the hope of avoiding liability or at least extracting favourable settlement terms'.¹⁵⁵

4.112 However, some stakeholders submitted that fair use would not necessarily cause economic harm to rights holders.¹⁵⁶ Many businesses are both owners and users of copyright materials and the experience in the US is that businesses and individuals make use of the fair use exception¹⁵⁷ and such use has not 'eclipsed or displaced' the sale or licensing of particular copyright content, for example, educational materials.¹⁵⁸ Google submitted that:

The idea that fair use somehow reduces copyright owners' rights is belied by the regular practice of large US media companies applying fair use in their every day commercial decisions.¹⁵⁹

4.113 Similarly, Universities Australia submitted that 'many of the same publishers who have raised concerns about fair use in Australia are themselves beneficiaries of fair use in their own commercial activities here and in the US'.¹⁶⁰

4.114 Research in Australia and elsewhere indicates that a fair use model would not 'open the floodgates' and encourage disrespect and noncompliance with copyright

148 For example, Australia Council for the Arts, *Submission 860*; AIATSIS, *Submission 762*; Australian Independent Record Labels Association, *Submission 752*; NRL, *Submission 732*; Australian Society of Authors, *Submission 712*; Australian Guild of Screen Composers, *Submission 687*; Alberts, *Submission 672*; MEAA, *Submission 652*; Country Press NSW, *Submission 651*.

149 For example, Australian Independent Record Labels Association, *Submission 752*; Foxtel, *Submission 748*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; Hillson, *Submission 671*; Australian Major Performing Arts Group, *Submission 648*; Music Council of Australia, *Submission 647*; Screenrights, *Submission 646*; Pearson Australia, *Submission 645*; COMPPS, *Submission 634*; Community Newspapers Australia, *Submission 489*.

150 AMPAL, *Submission 557*.

151 Australia Council for the Arts, *Submission 860*; Viscopy Board, *Submission 638*.

152 Federation of Indian Publishers, *Submission 736*; Australian Literary Agents' Association, *Submission 579*.

153 ALPSP, *Submission 199*.

154 For example, Cricket Australia, *Submission 700*.

155 ARIA, *Submission 241*.

156 For example, Universities Australia, *Submission 754*; Copyright Advisory Group—Schools, *Submission 707*; G Hinze, P Jaszi and M Sag, *Submission 483*.

157 Universities Australia, *Submission 754*; Google, *Submission 217*; Motion Picture Association of America Inc, *Submission 197* (although note they are opposed to the introduction of fair use in Australia).

158 G Hinze, P Jaszi and M Sag, *Submission 483*. See also Copyright Advisory Group—Schools, *Submission 707*.

159 Google, *Submission 217*.

160 Universities Australia, *Submission 754*.

law.¹⁶¹ On the contrary, fair use would appeal to consumers who would be more persuaded to pay for content, particularly when coupled with innovative business models.¹⁶²

4.115 Even stakeholders who were opposed to the introduction of fair use in Australia, such as the Motion Picture Association of America, acknowledged the workability of such a regime for businesses which are both content creators and users.¹⁶³ It acknowledged that its members depend upon fair use in their business and creative operations and that a fair use system can provide a supportive environment for creators and for legitimate users of copyright material.¹⁶⁴

4.116 The fair use exception requires a balancing of competing interests with respect to a particular use. In particular, the fourth fairness factor in the ALRC's recommended fair use exception is designed to protect copyright owners' markets.¹⁶⁵ If a use will have a significant effect on a rights holder's market; if it unfairly robs them of licensing revenue to which they should be entitled, then the use will probably not be fair. The introduction of a broad, flexible exception for fair use into Australian law should allow flexible and fair mediation between the interests of owners and users in the digital environment.

Fair use is sufficiently certain and predictable

4.117 Standards are generally less certain in scope than detailed rules. However, a clear principled standard is more certain than an unclear complex rule. This Report recommends replacing a number of complex prescriptive exceptions, with a clear and more certain standard, namely, fair use. The standard recommended by the ALRC is not novel or untested. Fair use builds on Australia's fair dealing exceptions, it has been applied in US courts for decades, and it is built on common law copyright principles that date back to the eighteenth century.

4.118 Nevertheless, the most significant concern raised by stakeholders opposed to fair use was that the lack of clear and precise rules would result in uncertainty about what uses are fair.¹⁶⁶ It was argued that the uncertainty would create a need for both rights

161 Australian Research Council Centre of Excellence for Creative Industries and Innovation, *Submission 208* relying on H Varian, 'Copying and Copyright' (2005) 19 *Journal of Economic Perspectives* 136 and J Karaganis, *Media Piracy in Developing Countries* (2011), Social Science Research Council. Hal Leonard Australia suggested that in the context of print music 'copyright law has had zero impact on the introduction of new and innovative business models': Hal Leonard Australia Pty Ltd, *Submission 202*.

162 Cyberspace Law and Policy Centre, *Submission 640*, citing D Vaile 'Shifting Sands? The moderate impact of Australia's 2006 copyright exceptions' in J Malcolm, *A2K for Consumers: Reports of Campaigns and Research 2008-2010* (2010).

163 Motion Picture Association of America Inc, *Submission 573*.

164 *Ibid.* It also submitted that a non-fair use system could do likewise.

165 The fairness factors are discussed further in Ch 5.

166 See, eg, Free TV Australia, *Submission 865*; ABC, *Submission 775*; Foxtel, *Submission 748*; News Corp Australia, *Submission 746*. The Ireland Review heard argument to similar effect when it inquired about changing its fair dealing provisions from closed-ended to open-ended exceptions: see Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 59.

holders and users to obtain legal advice, thus increasing transaction costs.¹⁶⁷ Where agreement cannot be reached on what is fair, litigation would be required to determine the scope of permitted uses.¹⁶⁸ Some stakeholders were concerned about a ‘chilling’ effect, as those who could not afford legal advice or the risk of litigation would avoid using material in a way that might in fact be fair.

4.119 Certainty is important for both rights holders and users of copyright material. Without the certainty that rights can be exploited, or about the extent to which they can be exploited, rights holders might not invest in innovative business models, and some potential creators might not create. Without certainty, the risk of investment can become too great. Uncertainty can therefore undermine a core purpose of copyright.

4.120 Users of copyright material also need some degree of certainty in the scope of exceptions. Not only will consumers value the certainty of knowing that they can make certain unpaid uses of material without infringing copyright, but businesses that make transformative uses of copyright material also need certainty, so that they have the confidence to invest in new business models and services. Optus would presumably not have invested in the development of its TV Now service, if the scope of the current time shifting exception were clearer.¹⁶⁹ CAG Schools submitted that complex copyright laws were preventing or discouraging Australian schools from using modern teaching methods.¹⁷⁰

4.121 In the ALRC’s view, fair use is sufficiently certain and predictable, and in any event, no less certain than Australia’s current copyright exceptions. Chapter 5 describes how owners and users of copyright material will be guided by the fairness factors, the list of illustrative purposes, existing Australian case law, other relevant jurisdictions’ case law, and any industry guidelines and codes of practice that are developed.

4.122 The test of fairness is also not novel in Australian law. The existing fair dealing exceptions require the application of a fairness test and the fairness factors that the ALRC is recommending are substantially the same as those currently provided in the fair dealing exceptions for research or study.¹⁷¹ In addition, substantial guidance can be obtained from overseas case law and academic commentary.

4.123 The evidence that is available, from recent research, suggests that fair use in the US is not uncertain.¹⁷² In 2009, Professor Pamela Samuelson published her ‘qualitative assessment’ of the fair use case law.¹⁷³ Samuelson argued that ‘fair use is both more coherent and more predictable than many commentators have perceived once one

167 See, eg, News Corp Australia, *Submission 746*; NRL, *Submission 732*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*; Combined Newspapers and Magazines Copyright Committee, *Submission 619*.

168 See, eg, Copyright Agency, *Submission 866*; Free TV Australia, *Submission 865*; Australia Council for the Arts, *Submission 860*.

169 This service was found to infringe copyright: *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.

170 Copyright Advisory Group—Schools, *Submission 707*.

171 See further Ch 5.

172 See, eg, R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Google, *Submission 217*.

173 P Samuelson, ‘Unbundling Fair Uses’ (2009) 77 *Fordham Law Review* 2537.

recognizes that fair use cases tend to fall into common patterns'.¹⁷⁴ She explained that it is generally possible to predict whether a use is likely to be fair use by analysing previously decided cases in the same policy cluster.¹⁷⁵

4.124 In 2012, Matthew Sag went further than Samuelson and 'assesse[d] the predictability of fair use in terms of case facts which exist prior to any judicial determination'.¹⁷⁶ He argued that his work

demonstrates that the uncertainty critique is somewhat overblown: an empirical analysis of the case law shows that, while there are many shades of gray in fair use litigation, there are also consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection.¹⁷⁷

4.125 US experience and empirical research suggest that certainty can come from guidelines developed by peak bodies, industry protocols, and internal procedures and documentation.¹⁷⁸ As discussed in Chapter 3, the Australian Communications and Media Authority points to the benefits of industry co-regulation and self-regulation in setting standards and developing understanding of practices.¹⁷⁹

4.126 A number of stakeholders point to the capacity of business, consumers and government to develop an understanding of acceptable practices. In the words of one stakeholder:

To suggest that legal change leads to insurmountable business difficulties in understanding legal obligations ignores that a new, more open-ended exception leaves entirely in place the established power of large private and institutional actors to continue to negotiate their copyright practices on the terms that they think are appropriate and reasonable.¹⁸⁰

4.127 The Australian Content Industry Group discussed the benefits of an industry code being developed between the Australian Government and relevant industry participants for a 'graduated response' to unauthorised downloading.¹⁸¹ This has not been concluded, but the process shows how an understanding of a principle of law might develop in specific industries and sectors.

4.128 It is important for individuals, institutions and business to know what uses they can make of copyright material, and it is important for rights holders to know when their rights are exclusive. However, concerns about certainty can be overstated. The ALRC does not agree with claims that 'the vast majority of uses' will be controversial.¹⁸² Most everyday uses will not be in question. As Robert Xavier noted 'practically all economically significant forms of infringement will be just as unlawful

174 Ibid, 2541.

175 Ibid, 2542.

176 M Sag, 'Predicting Fair Use' (2012) 73 *Ohio State Law Journal* 47, 51.

177 Ibid, 49.

178 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*; Copyright Advisory Group—Schools, *Submission 707*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

179 ACMA, *Submission 214*. See also News Limited, *Submission 286*.

180 K Bowrey, *Submission 554*.

181 ACIG, *Submission 190*. See also Music Rights Australia Pty Ltd, *Submission 191*.

182 See Arts Law Centre of Australia, *Submission 706*.

under fair use as they are now'.¹⁸³ Uncertainty is more likely to arise when a new use emerges, and such a use is more likely to be subject to litigation. The ACCC observed that it is in the newer areas of copyright use where flexibility is most necessary.¹⁸⁴

4.129 The opponents of fair use have pointed to research indicating that the outcome of fair use cases is unpredictable.¹⁸⁵ The outcome of litigation is never completely predictable—if it were, the parties would not have commenced litigation, or would likely have settled. This is also true of recent litigation over the fair dealing exceptions and specific exceptions.

4.130 The closed-ended nature of the fair dealing exceptions creates uncertainty, because it can be difficult to determine if a particular use falls into one of the specified purposes.¹⁸⁶ A number of stakeholders pointed out that *TCN Channel Nine v Network Ten Ltd* ('the Panel case')¹⁸⁷ focused on the question of whether the use of clips in an entertainment show was for the purpose of reporting news or the purpose of criticism and review.¹⁸⁸ Fair use would avoid this problem, by not confining the exception to a set of prescribed purposes.

Fair use is compatible with moral rights

4.131 The Arts Law Centre stated that the introduction of fair use would undermine moral rights. However, the ALRC considers that fair use is compatible with recognising the moral rights of creators. Further, it is no less compatible with moral rights than many existing exceptions, such as the fair dealing exceptions for parody and satire.¹⁸⁹

4.132 The application of moral rights themselves depend upon a range of factors determining reasonableness in particular circumstances.¹⁹⁰ The right of attribution afforded by the Australian legislation specifically takes this into account. For example, s 193 of the *Copyright Act* refers to the traditional legal concepts of author and work. It does not prescribe a narrower construction, but confers a right of attribution on all authors of copyright works. Section 195 requires that the author of the work may be identified by any reasonable form of identification, noting that what is reasonable will depend on the circumstances. It may be reasonable not to identify the author, depending on a range of factors.¹⁹¹ The condition of reasonableness was specifically included to take into account the reality that cultural practices and economic contexts where attribution may be possible will vary.¹⁹²

183 R Xavier, *Submission 146*.

184 ACCC, *Submission 658*.

185 ARIA, *Submission 241*.

186 Universities Australia, *Submission 754*; CSIRO, *Submission 242*.

187 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 108 FCR 235.

188 Universities Australia, *Submission 754*; NSW Government and Art Gallery of NSW, *Submission 740*; Copyright Advisory Group—Schools, *Submission 707*.

189 *Copyright Act 1968* (Cth) s 41A.

190 See, for example, *Ibid* ss 195AR; 194AS; 195AT; 195VA; 195AXD; 195AXE; 195AXH.

191 *Ibid* s 195AR.

192 Second Reading Speech, Copyright Amendment (Moral Rights) Bill 1999 (Cth).

4.133 Fair use does not dispense with moral rights, any more than the current fair dealing provisions do. Guidelines and jurisprudence may also be expected to be developed to clarify what is good practice in regard to respecting moral rights.

Fair use complies with the three-step test

4.134 Despite the fact that the US has had a fair use exception for 35 years, a frequent argument against the introduction of fair use in Australia is that it may not comply with the three-step test under international copyright law.¹⁹³

4.135 Article 9(2) of the *Berne Convention*, provides:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, 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.¹⁹⁴

4.136 The three-step test has become the international standard for assessing the permissibility of copyright exceptions generally. For example, in 1994 the three-step test was incorporated into the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs).¹⁹⁵ With respect to copyright, it now applies to exceptions to an author's exclusive right of reproduction and to all economic rights under copyright excluding moral rights and the so-called related or neighbouring rights. Another obligation which should be noted is the AUSFTA, which requires Australia to employ the three-step test for exceptions to all exclusive rights of the copyright owner.¹⁹⁶

4.137 As its name suggests, the test consists of three cumulative steps or conditions. Limitations or exceptions to exclusive rights must be confined to

- (1) 'certain special cases';

193 Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; AFL, *Submission 717*; Arts Law Centre of Australia, *Submission 706*; APRA/AMCOS, *Submission 664*; Queensland Law Society, *Submission 644*.

194 The three-step test was retained in this form in the Paris Act of 24 July 1971, the latest Act of the *Berne Convention*: M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004), 52.

195 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, ATS 38 (entered into force on 1 January 1995). The three-step test was incorporated in a number of ways. First, the three-step test is included in TRIPs in respect of copyright, in respect of patents (albeit a modified version of the test) and arguably there are certain elements of the test present in respect of the general article relating to exceptions for trade marks. See M Ficsor, 'How Much of What? The "Three-Step Test" and its Application in Two Recent WTO Dispute Settlement Cases' (2002) 192 *Revue Internationale du Droit D'Auteur* 110, 111, 113. Secondly, in respect copyright, the three-step test was incorporated by way of a 'double insertion'. The first insertion is by operation of art 9(1) of TRIPs which incorporates art 9(2) of the *Berne Convention* into TRIPs. The second insertion is by operation of art 13 of TRIPs.

196 *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005) art 17.4.10(a).

- (2) which do ‘not conflict with a normal exploitation’ of the copyright material;¹⁹⁷
and
- (3) do ‘not unreasonably prejudice the legitimate interests’ of the rights holder.¹⁹⁸

4.138 The precise meaning of each step of the test is far from certain. There has been only one World Trade Organization (WTO) Panel report on the three-step test as it relates to copyright under TRIPs.¹⁹⁹ In this report, the Panel explained

there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.²⁰⁰

4.139 The ALRC considers that fair use is consistent with the three-step test. This conclusion is based on an analysis of the history of the test, an analysis of the words of the test itself, and on the absence of any challenge to the US and other countries²⁰¹ that have introduced fair use or extended fair dealing exceptions.

The history and context of the three-step test

4.140 The three-step test was first incorporated into international copyright law during the 1967 Stockholm revision of the *Berne Convention*.²⁰² This revision also saw the introduction of the right of reproduction. Those developing the revised treaty text thought it necessary to have a provision setting out a general standard that exceptions to the right of reproduction must meet in order to be permissible.

4.141 As some national laws already contained various exceptions to the right of reproduction, that members to the *Berne Convention* wanted to retain, those developing the text were mindful that it would be necessary ‘to ensure that this provision did not encroach upon exceptions that were already contained in national laws’ and that ‘it would also be necessary to ensure that it did not allow for the making of wider exceptions that might have the effect of undermining the newly recognized right’.²⁰³

4.142 Some stakeholders submitted that the origins of the three-step test suggest that it was not intended to be a rigid prohibition on copyright exceptions.²⁰⁴ Some

197 The broad term ‘copyright material’ is used here rather than the particular works or subject matter other than works that are used in the treaties.

198 Article 9(2) of the Berne Convention uses the word ‘author’ whereas TRIPs uses the word ‘right holder’.

199 World Trade Organization, *Panel Report on United States–Section 110(5) of the US Copyright Act*, WT/DS160/R (2000).

200 *Ibid.*, [6.108].

201 G Pessach, ‘The New Israeli Copyright Act: A Case-Study in Reverse Comparative Law’ (2010) 41 *International Review of Intellectual Property and Competition Law* 187, 192–193.

202 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

203 S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (2003), prepared for the World Intellectual Property Organization Standing Committee on Copyright and Related Rights Ninth Session, 20.

204 International IP Researchers, *Submission 713*; G Hinze, P Jaszi and M Sag, *Submission 483*.

stakeholders referred to Dr Martin Senftleben's comprehensive study of the three-step test published in 2004.²⁰⁵ For example, CAG Schools submitted:

Dr Senftleben has shown that the three-step test was intended to reconcile the many different types of exceptions that already existed when it was introduced, and to be an abstract, open formula that could accommodate a 'wide range of exceptions'.²⁰⁶

4.143 Some academics submitted that subsequent international agreements and state practice confirm that it is an open formula capable of encompassing a wide range of exceptions.²⁰⁷

4.144 In 1996, the three-step test was incorporated into the *WIPO Copyright Treaty* (WCT)²⁰⁸ and *WIPO Performances and Phonograms Treaty* (WPPT),²⁰⁹ both sometimes collectively referred to as the WIPO Internet treaties. The Diplomatic Conference that adopted the WCT and WPPT texts, adopted the following agreed statement in respect of art 10 of the WCT, which applies mutatis mutandis to art 16 of the WPPT:²¹⁰

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the *Berne Convention*. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.²¹¹

4.145 One commentator observed:

Pursuant to article 31(2)(a) of the *Vienna Convention [on the Law of Treaties]*, 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' forms part of the context for the purpose of interpretation. The agreed statement concerning article 10 WCT is thus a relatively strong source of interpretation. ... [I]t must be considered directly in connection with the treaty text itself.²¹²

4.146 The CLRC took the view that its open-ended fair dealing model would be consistent with the three-step test, in part because it considered that its model would be

205 M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004).

206 Copyright Advisory Group—Schools, *Submission 231*. See also G Hinze, P Jaszi and M Sag, *Submission 483*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*; Universities Australia, *Submission 246*; Google, *Submission 217*.

207 G Hinze, P Jaszi and M Sag, *Submission 483*.

208 *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002). There was another 'double insertion'. The first insertion is by operation of art 1(4) of the WCT which incorporates art 9(2) of the *Berne Convention* into the WCT. The second insertion is by operation of art 10 of the WCT.

209 *World Intellectual Property Organization Performances and Phonograms Treaty*, opened for signature 20 December 1996, ATS 27 (entered into force on 20 May 2002).

210 *Agreed statements concerning WIPO Performances and Phonograms Treaty*, adopted by the Diplomatic Conference on December 20, 1996, concerning art 16.

211 *Agreed Statements Concerning the WIPO Copyright Treaty*, adopted by the Diplomatic Conference on 20 December 1996, concerning art 10.

212 M Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004), 106.

‘one such appropriate extension into the digital environment’ and so would be ‘in the spirit of art 10’ of the WCT in light of the agreed statement.²¹³

Interpreting the three-step test

4.147 Many copyright scholars have endorsed the interpretation of the three-step test in the *Declaration on a Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law*, sometimes referred to as the Munich Declaration.²¹⁴ Among other things, signatories to this Declaration are of the view that:

The Three-Step Test’s restriction of limitations and exceptions to exclusive rights to certain special cases does not prevent

(a) legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable ...

4.148 A submission to this Inquiry—signed by 51 international intellectual property researchers—stated that fair use can operate in a manner that is sufficiently foreseeable for rights holders and third parties and that the three-step test does not preclude the introduction of open-ended exceptions like fair use.²¹⁵ This submission referred to the analysis of the history of the three-step test referred to above and also expressly approved of specific parts of the Munich Declaration.

4.149 If the ‘special case’ requirement necessitated identification of the special cases in advance by the legislature, then Australia would already be in breach of its international obligations, because s 200AB is not confined to particular purposes.²¹⁶

4.150 Associate Professor Jani McCutcheon submitted that a fair use exception would be a ‘special case’ because fairness itself is a special case. In her view, ‘the fact that many types of uses may be fair is irrelevant and does not prevent compliance’.²¹⁷

4.151 The question of whether fair use is compatible with the three-step test is really a question of whether it meets the first step.²¹⁸ The ALRC has no reason to conclude that a new fair use exception would breach the second or third steps of the test. Some stakeholders were also of this view.²¹⁹ One submission explained:

Fair use could only conflict with a normal exploitation of the work and could only unreasonably prejudice the legitimate interests of the right holder if it were applied incautiously by the judiciary. The same is true of the existing exceptions.²²⁰

213 Copyright Law Review Committee, *Simplification of the Copyright Act 1968. Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), 54.

214 C Geigher et al, *Declaration: A Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law* (2008).

215 International IP Researchers, *Submission 713*.

216 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716* (‘the fact that s 200AB has been made expressly subject to the three-step test does not sidestep this issue, since this does nothing to spell out the uses that are permitted in advance of a judicial determination’).

217 J McCutcheon, *Submission 528*.

218 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716* citing S Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (2002), 153.

219 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

220 Ibid.

4.152 The third limb of the three-step test provides only that limitations or exceptions must not ‘unreasonably’ prejudice the ‘legitimate’ interests of the rights holder. The test does not say an exception must never prejudice any interest of an author.

4.153 Some stakeholders submitted that the three-step test should be given a more limited interpretation.²²¹ Copyright Agency noted that while the three-step test has been the ‘subject of discussion in the academic community, there has been no revision process at the international level under the auspices of the WIPO.’²²² Further, some submissions noted that arguments for a more flexible interpretation have only been made recently and are controversial.²²³

No challenges in international forums

4.154 The fact that the US and other countries that have introduced fair use or extended fair dealing exceptions consider their exceptions to be compliant, and have not been challenged in international forums, suggests that fair use complies with the three-step test.

4.155 A number of stakeholders observed that the US has never seriously been challenged about the consistency of its fair use exception with the three-step test.²²⁴ Opportunities for such challenge included the steps taken to adhere to the *Berne Convention*—‘years of public hearings before the US Congress, as well as numerous consultations with WIPO and foreign experts’²²⁵—where transcripts of hearings reveal that not once was there considered to be a problem with fair use and the three-step test.²²⁶

4.156 Further, other countries which have introduced an exception for fair use such as The Philippines, Israel and the Republic of Korea, or an exception for extended fair dealing such as Singapore, have not been challenged in international forums about the enactment of such provisions. Like Australia, all of these countries are party to the *Berne Convention*, the WCT and the WPPT, among other WIPO treaties, and are WTO members.

4.157 A number of rights holders and their advocates criticised this argument, submitting that such an argument does not necessarily lead to the conclusion that fair use is consistent with the three-step test.²²⁷ Some of these stakeholders raised the possibility that there may be other reasons for the absence of challenges in international forums. For example, APRA/AMCOS and Screenrights observed that the US was

221 Australian Film/TV Bodies, *Submission 739*; Copyright Agency, *Submission 727*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*.

222 Copyright Agency, *Submission 727*.

223 APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*.

224 R Giblin, *Submission 251*; Universities Australia, *Submission 246*; Copyright Advisory Group—Schools, *Submission 231*; Google, *Submission 217*.

225 W Patry, *Fair Use and Fair Dealing* (2008), 8.

226 Ibid.

227 ARIA, *Submission 731*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; Screenrights, *Submission 646*.

unique and enjoys a vast position of strength in international forums.²²⁸ ARIA submitted that it would make little sense for a WTO member to challenge the ‘abstract concept’ of fair use; rather, there would only be a challenge if a particular application of fair use by US courts so aggrieves a member that the member considers it sufficiently significant to challenge.²²⁹

4.158 The ALRC is not persuaded by these arguments to abandon the recommendation for fair use. It is clear that the US and the other countries mentioned consider that their provisions are consistent with the three-step test. The Ireland Review was satisfied that a fair use doctrine, such as that existing in the US, is compatible with the three-step test.²³⁰ One submission to this Inquiry suggested that the countries which have introduced exceptions for fair use had accepted that the ‘special case’ requirement may be fulfilled by the judiciary identifying special cases after the event.²³¹

4.159 With respect to the US, one stakeholder referred to correspondence with the US Trade Representative, Ambassador Ronald Kirk, in September 2012, confirming that:

The United States takes the position that nothing in existing US copyright law, as interpreted by the federal courts of appeals, would be inconsistent with its proposed three-step test [for the Trans Pacific Partnership Agreement].²³²

4.160 Similarly, another submission referred to a WTO review of copyright legislation in 2006 where, in response to a question about the consistency of US fair use with art 13 of TRIPs, the US replied:

The fair use doctrine of US copyright law embodies essentially the same goals as Article 13 of TRIPs, and is applied and interpreted in a way entirely congruent with the standards set forth in that Article.²³³

4.161 Three US-based academics suggested that it was unlikely that the US would have both acceded to the *Berne Convention* and promoted the incorporation of the three-step test into TRIPs, the WCT and into bilateral free trade agreements, if there were concerns about the fair use doctrine being fundamentally at odds with that test.²³⁴

4.162 Universities Australia made a similar point:

Hugenoltz and Senftleben have noted that the Minutes of Main Committee for the 1996 WIPO Diplomatic Conference (that led to the adoption of the WIPO Internet Treaties) provide evidence of ‘the determination to shelter use privileges’, including determination on the part of the US to ‘safeguard the fair use doctrine’.²³⁵

228 APRA/AMCOS, *Submission 664*; Screenrights, *Submission 646*.

229 ARIA, *Submission 731*.

230 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 91–2.

231 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

232 G Hinze, P Jaszi and M Sag, *Submission 483*. The correspondence is available at infojustice.org/wp-content/uploads/2012/09/PIJIP-letter-to-Kirk-September-8-2012.pdf.

233 R Giblin, *Submission 251*. See W Patry, *Patry on Fair Use* (2012), 554–57. Giblin notes the response was accepted.

234 G Hinze, P Jaszi and M Sag, *Submission 483*.

235 Universities Australia, *Submission 246* citing B Hugenoltz and M Senftleben, *Fair Use in Europe: In Search of Flexibilities* (2011), 22.

4.163 The fact that the US has already been subject to challenge in the WTO with respect to one provision of its copyright statute²³⁶ suggests that the US is not so 'unique' as to be immune from challenge in the WTO if its fair use provision was thought to be inconsistent with the three-step test.

4.164 To deny Australia the significant economic and social benefits of a fair use exception, the arguments that fair use is inconsistent with international law should be strong and persuasive, particularly considering other countries are enjoying the benefits of the exception. The ALRC does not find these arguments persuasive, and considers fair use to be consistent with international law.

<p>Recommendation 4-1 The <i>Copyright Act 1968</i> (Cth) should provide an exception for fair use.</p>

236 World Trade Organization, *Panel Report on United States–Section 110(5) of the US Copyright Act*, WT/DS160/R (2000).