

## 9. Quotation

---

### Contents

Summary	209
Quotation and copyright law	210
Substantiality and fair dealing	210
Fair use and quotation	211
Interpreting fair use	213
Objections to a quotation exception	215
Quotation as an illustrative purpose	217
Fair dealing for the purpose of quotation	219
The <i>Berne Convention</i> and quotation	219
Framing a quotation exception	221
Fair dealing and quotation	224

### Summary

9.1 The *Copyright Act* does not provide a stand-alone exception for quotation, or the taking of some part of copyright material, usually for the purpose of supporting an intellectual commentary or artistic idea.

9.2 This chapter considers various uses of copyright material in quotation, and describes examples of quotation that may be covered by fair use but are, in at least some circumstances, not covered by existing fair dealing exceptions. It also explains how the concept of quotation can be expected to be interpreted under a fair use exception.

9.3 The ALRC recommends that a fair use exception should be applied when determining whether quotation infringes copyright and that ‘quotation’ should be an illustrative purpose in the fair use exception.

9.4 The arguments in favour of including quotation as an illustrative purpose parallel those for introducing a fair use exception more generally (see Chapter 4). These include that fair use provides a standard that is flexible and technology-neutral, promotes transformative uses, assists innovation and better aligns with reasonable consumer expectations.

9.5 While the extent to which a particular use constitutes quotation can be important in assessing fair use in relation to the other illustrative purposes, the ALRC considers that it is important to signal that quotation may be fair use, without the need to be for any defined purpose.

9.6 In addition, expressly providing more scope for quotation in Australian copyright law will also ensure that Australia meets obligations under art 10(1) of the *Berne Convention*, while continuing to comply with the three-step test under art 9(2).<sup>1</sup>

9.7 The ALRC also recommends that, if fair use is not enacted, the *Copyright Act* should be amended to introduce a new fair dealing exception, including quotation as a prescribed purpose, which may be held to be fair dealing. The chapter discusses how such an exception should be framed.

## Quotation and copyright law

9.8 In international copyright law, quotation refers to the taking of some part of a greater whole—a group of words from a text or a speech, a musical passage or visual image taken from a piece of music or a work of art—where the taking is done by someone other than the creator of the work.<sup>2</sup>

9.9 However, in Australian copyright law, quotation is not a term of art.<sup>3</sup> The *Copyright Act* does not provide a stand-alone exception for quotation. Rather, other concepts are used to govern whether a quotation infringes copyright.

## Substantiality and fair dealing

9.10 The Act provides that an act will infringe copyright only if the act is done in relation to a ‘substantial part’ of a work or other subject matter.<sup>4</sup> The phrase ‘substantial part’ has been held to refer to the quality of what is taken rather than the quantity, and courts have refused to prescribe any particular proportion as amounting to a substantial part.<sup>5</sup> In determining whether the part taken is ‘substantial’, the most important question is whether the part is an ‘essential’, ‘vital’ or ‘material’ part, in relation to the work as a whole.<sup>6</sup>

9.11 If a substantial part of the copyright material is ‘quoted’, infringement will generally occur unless the quotation is covered incidentally by the fair dealing exceptions for criticism or review; parody or satire; or news reporting.<sup>7</sup> While in some cases, the copying of the whole of a work may be regarded as a fair dealing for the purpose of research or study,<sup>8</sup> this is unlikely in other cases, such as criticism and review.

1 *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).

2 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 788, commenting on the quotation right provided for in the *Berne Convention*.

3 E Adeney, ‘Appropriation in the Name of Art: Is a Quotation Exception the Answer?’ (2013) 23(3) *Australian Intellectual Property Journal* 142, 143.

4 *Copyright Act 1968* (Cth) s 14(1)(a).

5 See Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [9.20].

6 *Ibid*, [9.20], citing *Blackie & Sons Ltd v Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396.

7 *Copyright Act 1968* (Cth) ss 41, 41A, 42.

8 *Ibid* s 40(2).

9.12 Some fair dealing exceptions list matters to be considered when determining whether the use constitutes a fair dealing.<sup>9</sup> These matters include ‘the amount and substantiality of the part copied, taken or recorded in relation to the whole work, adaptation, item or performance’. In addition, the fair dealing exception for the purpose of research or study (with respect to works and adaptations) contains a quantitative test that deems the use of certain quantities of copyright material to be fair.<sup>10</sup>

### Fair use and quotation

9.13 The ALRC recommends that a fair use exception should be applied when determining whether quotation infringes copyright and that ‘quotation’ should be an illustrative purpose in the fair use exception.

9.14 Some examples of quotation that may be covered by fair use but are, in at least some circumstances, not covered by existing fair dealing exceptions, include:

- ‘use of images in a presentation or seminar to illustrate the point being made’;<sup>11</sup>
- ‘use of short quotations in academic publications’;<sup>12</sup>
- reproduction of ‘an extract from a book in the course of reviewing a film’ of that book;<sup>13</sup>
- reproduction of ‘an extract from a play in the course of reviewing a performance of a play’;<sup>14</sup>
- use of quotations in exhibition catalogues or publicity material for museums and art galleries;
- use of quotations as epigrams at the beginning of novels; and
- use of quotations in a range of artistic practices such as ‘sampling’, ‘mashups’ and ‘remixes’.<sup>15</sup>

9.15 Arguably, the reason some of these uses are not covered by existing fair dealing exceptions may be more drafting oversight or lack of foresight, rather than principled outcome. For example, the reason a quotation from a book cannot be used in the course

9 Ibid ss 40 (fair dealing for purpose of research or study); 248A(1A) (indirect sound recording of a performance).

10 See Ibid s 40(3)–(8). The concept of ‘reasonable portion’ is fixed by reference to chapters, or 10% of the number of pages or number of words.

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

12 R Wright, *Submission 167*.

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

14 Ibid.

15 Sampling is the act of taking a part, or sample, of a work and reusing it in a different work. The concept is most well-known in relation to music, where samples of one or more sound recordings are reused in a different composition. A mashup is a composite work comprising samples of other works. In music, a mashup is a song created by blending two or more songs, usually by overlaying the vocal track of one song onto the music track of another. Remixes are generally a combination of altered sound recordings of musical works: See *The Macquarie Dictionary Online*; APRA/AMCOS, *Submission 247*.

of reviewing a film is that the relevant fair dealing exception only applies where the criticism or review is of that work or another work, and ‘work’ specifically does not include a ‘cinematograph film’.<sup>16</sup>

9.16 In other cases, the problem lies with the purpose-based, or closed-ended nature of the fair dealing exceptions. For example, in many cases quotations will not be directly for ‘criticism or review’ or ‘research or study’, but for other purposes, such as academic publication, that serve important public interests.

9.17 In the context of artistic practice, several stakeholders referred to the case of *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd*<sup>17</sup> (the Kookaburra case) as illustrating a gap in the law.<sup>18</sup> In the Kookaburra case, EMI’s recordings of the Men at Work song ‘Down Under’ were found to have infringed the copyright in the song ‘Kookaburra Sits in the Old Gum Tree’.

9.18 In the Full Federal Court decision, Emmett J expressed his ‘disquiet’ in finding copyright infringement in the circumstances of the case:<sup>19</sup>

The better view of the taking of the melody from Kookaburra is not that the melody was taken ... in order to save effort on the part of the composer of Down Under, by appropriating the results of Ms Sinclair’s efforts. Rather, the quotation or reproduction of the melody of Kookaburra appears by way of tribute to the iconicity of Kookaburra, and as one of a number of references made in Down Under to Australian icons.<sup>20</sup>

9.19 The judgment was seen by some as ‘draconian in its decision that the referencing of an earlier, culturally iconic, work by a later creative work was an illegitimate activity’.<sup>21</sup> Fair dealing exceptions were not available, or even mentioned, in the judgment—the fact that the part of work taken was found to be substantial was sufficient to show infringement. Elizabeth Adeney observes that

In everyday speech, what Men at Work had done could probably best be described as ‘quotation’, and indeed it was described as such repeatedly by the judges who heard the case.<sup>22</sup>

9.20 Fair use in relation to quotation may provide more room for some artistic practices, including the sampling, mashup and remixing of copyright material in musical compositions, new films, art works and fan fiction.<sup>23</sup> More broadly, some artistic practices based on appropriation, including collage, where images or objects are ‘borrowed’ and re-contextualised might be covered by fair use.

16 See *Copyright Act 1968* (Cth) s 41; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

17 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444.

18 For example, R Wright, *Submission 167*; R Xavier, *Submission 146*; M Rimmer, *Submission 143*.

19 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444, [98].

20 *Ibid.*, [99].

21 E Adeney, ‘Appropriation in the Name of Art: Is a Quotation Exception the Answer?’ (2013) 23(3) *Australian Intellectual Property Journal* 142, 142.

22 *Ibid.*, 143.

23 See examples cited in ADA and ALCC, *Submission 213*.

9.21 It is not possible to say, however, whether or not the Kookaburra case would have been decided differently under a fair use (or fair dealing for quotation) exception. In the ALRC's view, however, it would have been better for fairness factors to have been available for consideration.

### Interpreting fair use

9.22 The concept of quotation is central to fair use doctrine in the United States. Even before the codification of fair use in the US, fair use was considered to cover the quotation of excerpts in a review or criticism for purposes of illustration or comment, and the quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations.<sup>24</sup>

9.23 The *Copyright Act 1976* (US) provides that one of the factors determining fair use is 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole'.<sup>25</sup> US case law establishes that the amount of the copyright work quoted is not always determinative of fair use, and will depend on the application of other fair use factors.<sup>26</sup> It has been held that there is both a quantitative and qualitative element to determining whether a quotation is fair use.<sup>27</sup>

9.24 The ALRC's third fairness factor is phrased in an almost identical way to the US provision, that is, in referring to 'the amount and substantiality of the part used'. Some existing Australian fair dealing exceptions already include 'the amount and substantiality of the part' as a matter to be considered when determining whether use constitutes a fair dealing.<sup>28</sup>

9.25 In interpreting the application of the fairness factors to the use of any particular quotation, guidance would be found in existing Australian case law and, as discussed in Chapter 5, case law in the US and other relevant jurisdictions.

9.26 In applying fairness factors to the use of quotations, some considerations would be as follows:

***The purpose and character of the use.*** The commercial use of a quotation will weigh against fair use. This may cover, for example, uses of sampling in the music industry. The extent to which the use is 'transformative' is also relevant—for example, where a quotation from a book is used as dialogue in a movie.<sup>29</sup>

24 United States House of Representatives, Committee on the Judiciary, *Copyright Law Revision (House Report No. 94-1476)* (1976), 5678–5679.

25 *Copyright Act 1976* (US) s 107(3).

26 *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 586–587.

27 *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539.

28 *Copyright Act 1968* (Cth) ss 40 (fair dealing for purpose of research or study); 248A(1A) (indirect sound recording of a performance).

29 See, eg. *Faulkner Literary Rights LLC v Sony Picture Classics Inc* (Unreported, US District Court for the Northern District of Mississippi, Mills CJ, 18 July 2013): 'The copyrighted work is a serious piece of literature lifted for use in a speaking part in a movie comedy, as opposed to a printed portion of a novel printed in a newspaper, or a song's melody sampled in another song. This transmutation in medium tips this factor in favour of transformative, and thus, fair use', 9. The case concerned the Woody Allen film *Midnight in Paris*.

**The nature of the copyright material used.** The extent to which the use of a quotation is creative may be relevant. The choice of a photograph of an artistic work in an exhibition catalogue is less creative than, for example, the use of an epigram in a novel—and less likely in the former case to be fair use. If a quotation is taken from an unpublished source it may be considered less likely to be fair than if the quotation is from a well-known work.

**The amount and substantiality of the part used.** The amount used in a quotation, both in relation to the original and the new material, is relevant to fair use. If, for example, in the Kookaburra case, the music taken was ‘practically the whole melody’,<sup>30</sup> this would dictate against fair use. On the other hand, in some contexts, the use of the whole of a work may be permitted—as where the whole of a short poem is used.<sup>31</sup>

**Effect of the use upon the market.** The effect of a quotation on the market for the original will be a relevant factor. For example, where use of a quotation may easily be licensed, this may dictate against fair use—as, for example, in the case of sports highlights. Sometimes a quotation may be likely to increase the market value of the original material, which will weigh in favour of fair use.<sup>32</sup>

9.27 In the ALRC’s view, there are strong arguments that Australian copyright law should provide more scope for the quotation of copyright material—particularly where there is little or no effect on the potential market for, or value of, the copyright material.

9.28 The idea of including ‘quotation’ as an illustrative purpose in the fair use exception received express support from many stakeholders<sup>33</sup>—in addition to support for a fair use exception generally. The Intellectual Property Committee, Law Council of Australia stated that quotation should be an illustrative purpose and that this should not be further constrained by quotation for one or more specified purposes:

The specification of one or particular ‘approved’ purposes will lead to arguments that other unspecified purposes were not intended to be protected. Instead, it would be preferable for the nature, purpose and the extent of use to be assessed under the fairness criteria.<sup>34</sup>

30 E Adeney, ‘Appropriation in the Name of Art: Is a Quotation Exception the Answer?’ (2013) 23(3) *Australian Intellectual Property Journal* 142, 144.

31 See *Hubbard v Vosper* [1972] 2 QB 84, 98 concerning fair dealing for criticism or review, in which Megaw LJ referred to an epitaph on a tombstone.

32 The *Midnight in Paris* decision stated: ‘The court, in its appreciation for both William Faulkner as well as the homage paid him in Woody Allen’s film, is more likely to suppose that the film indeed helped the plaintiff and the market value of [the book *Requiem for a Nun*] if it had any effect at all’: *Faulkner Literary Rights LLC v Sony Picture Classics Inc* (Unreported, US District Court for the Northern District of Mississippi, Mills CJ, 18 July 2013), 13.

33 CSIRO, *Submission 774*; Intellectual Property Committee, Law Council of Australia, *Submission 765*; AIATSIS, *Submission 762*; NFSA, *Submission 750*; NSW Government and Art Gallery of NSW, *Submission 740*; EFA, *Submission 714*; Pirate Party Australia, *Submission 689*; National Archives of Australia, *Submission 595*; K Bowrey, *Submission 554*; R Xavier, *Submission 531*. Some stakeholders also expressed support for a fair dealing for quotation exception: AIATSIS, *Submission 762*; NFSA, *Submission 750*; National Archives of Australia, *Submission 595*; International Association of Scientific Technical and Medical Publishers, *Submission 560*.

34 Intellectual Property Committee, Law Council of Australia, *Submission 765*.

9.29 The Australian War Memorial submitted that the ‘capacity to quote from published and unpublished works is a use not adequately covered by specific libraries and archives exceptions’ and should be included under a fair use exception.<sup>35</sup>

### Objections to a quotation exception

9.30 Stakeholders who opposed any new exception applying to quotation did so for a range of reasons,<sup>36</sup> including on the basis that such an exception would:

- be unnecessary as existing exceptions adequately cover quotation,<sup>37</sup>
- present significant drafting problems and produce uncertainty;<sup>38</sup>
- interfere with existing licensing practices,<sup>39</sup> and
- conflict with the three-step test under the *Berne Convention*.<sup>40</sup>

9.31 Stakeholders emphasised the existing role of the concept of substantiality and the fair dealing exceptions in determining whether quotation is permissible, which were said to provide sufficient coverage.

9.32 News Corp Australia, for example, stated that while existing fair dealing exceptions are ‘limited to purposes of use which are socially beneficial or which do not detract from the commercial competitiveness of the copyright owners’ work’, an exception for quotation ‘focuses on the type of use—with no consideration of the purpose of the use—the implication of which would be significant copyright appropriation’.<sup>41</sup>

9.33 The iGEA suggested that quotation would be ‘better addressed through the concept of “substantial part” as a test for infringement rather than through a specific quotation exception’ as is permitted through existing fair dealing exceptions. Similarly, Australian Film/TV Bodies stated that ‘existing fair dealing provisions already exempt quotations of a substantial part of a copyrighted work in legitimate circumstances’.<sup>42</sup>

35 Australian War Memorial, *Submission 720*.

36 News Corp Australia, *Submission 746*; iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; MEAA, *Submission 652*; Music Council of Australia, *Submission 647*; Screenrights, *Submission 646*; Pearson Australia, *Submission 645*; COMPPS, *Submission 634*; ALPSP, *Submission 562*.

37 News Corp Australia, *Submission 746*; iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*; Arts Law Centre of Australia, *Submission 706*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; NAVA, *Submission 655*; MEAA, *Submission 652*; Screenrights, *Submission 646*; ALPSP, *Submission 562*.

38 Cricket Australia, *Submission 700*; Music Council of Australia, *Submission 647*.

39 iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*; ARIA, *Submission 731*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; Pearson Australia, *Submission 645*; APRA/AMCOS, *Submission 664*; COMPPS, *Submission 634*.

40 Australian Film/TV Bodies, *Submission 739*; Australian Copyright Council, *Submission 219*.

41 News Corp Australia, *Submission 746*.

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

9.34 The Australian Copyright Council observed that a quotation exception might work better for some types of copyright material than others.

For example, quotation has a natural meaning when applied to literary works. For other types of copyright material, licensing models exist for quotations. Music and film sampling are examples that come readily to mind. In our submission, this issue is better mediated by the concept of substantial part than by a specific exception.<sup>43</sup>

9.35 Stakeholders raised general concerns about uncertainty being produced by a new exception. The MCA, for example, stated that there is ‘already sufficient uncertainty in the nature of the application of the tests concerning a “substantial part” without including a further similar flexible (and thereby inherently uncertain) concept into the fair dealing exception’. The MCA considered that ‘any exception drafted on that basis may raise more problems than it purports to solve’.<sup>44</sup> Similarly, Cricket Australia submitted that a new fair dealing exception for quotation would be ‘uncertain and open to interpretation, particularly as to when a particular use amounts to quotation’.<sup>45</sup>

9.36 Stakeholders highlighted possible harm to existing (and potential) markets for copyright material, including in music, computer games, publishing and sport. The music industry provided information about existing commercial licensing solutions for the use of sound recordings and musical works as samples.<sup>46</sup> The licensing of sampling was said to be a significant part of music publishers’ and composers’ income.<sup>47</sup>

9.37 ARIA submitted that the introduction of a quotation exception would have a ‘detrimental impact on the creators and owners of sound recordings and musical works’—particularly if the exception was extended to sampling. ARIA strongly recommended that the ALRC consider the ‘inevitable disruption to existing licensing practices and the harm that such changes will bring to artists and copyright owners if such an exception is introduced’.<sup>48</sup> Australian Copyright Council observed that

creating a new fair dealing exception for quotation to facilitate mashups and other user-generated content would need to be justified on significant public policy grounds. For example, freedom of expression. In our submission, an exception simply to legitimate common consumer behaviour would sit oddly as a fair dealing.<sup>49</sup>

9.38 The iGEA considered that an exception for quotation would, for example, damage developing markets for ‘clip licensing’ of video games.<sup>50</sup> Particular concerns were expressed about the impact of a quotation exception on other markets for audiovisual content. Australian Film/TV Bodies stated that to allow for quotation outside the existing fair dealing purposes, for example to ‘use an extract from a television broadcast in another television broadcast, is likely to significantly curtail

---

43 Australian Copyright Council, *Submission 654*.

44 Music Council of Australia, *Submission 269*.

45 Cricket Australia, *Submission 700*.

46 ARIA, *Submission 731*; APRA/AMCOS, *Submission 664*; APRA/AMCOS, *Submission 247*.

47 APRA/AMCOS, *Submission 247*.

48 ARIA, *Submission 731*.

49 Australian Copyright Council, *Submission 219*.

50 iGEA, *Submission 741*.



rights holders' legitimate licensing markets' as most content licensed between TV stations 'consists of short extracts of footage that is less than 60 seconds'.<sup>51</sup>

9.39 COMPPS expressed specific concerns that a broad interpretation of what amounts to a 'quotation' might permit unlicensed third parties to communicate highlights of sporting events 'under the guise of fair dealing for quotation' and submitted that this would 'detrimentally and unreasonably impact upon the exploitation of such rights by COMPPS' members'.<sup>52</sup> Individual sporting organisations also opposed a quotation exception on this basis.<sup>53</sup>

9.40 Some stakeholders considered that a quotation exception may be inconsistent with the three-step test provided by the *Berne Convention*.<sup>54</sup> Australian Film/TV Bodies submitted

If free usage of short 'quotations' becomes permissible, then rights holders operating in the sector are likely to lose their main source of revenue. Such an outcome is not consistent with the second and third steps of the Three-Part Test.<sup>55</sup>

9.41 The ALRC does not find the arguments against a quotation exception to be convincing. As discussed below, there are many examples of uses that may be considered fair but are not covered by existing exceptions, and the substantiality principle is insufficient to protect these uses. Complaints that a quotation exception would interfere with licensing models and conflict with the *Berne Convention* disregard the effect of the application of the fairness factors.

### **Quotation as an illustrative purpose**

9.42 Arguments may be raised that it is unnecessary to include quotation as an illustrative purpose because it is fundamental to assessing fair use, including in relation to the other illustrative purposes. However, the ALRC considers that it is important to signal that quotation may be fair use, without having to be shown as being for any defined purpose.

9.43 The arguments in favour of including quotation as an illustrative purpose parallel those for introducing a fair use exception more generally. These include that fair use provides a standard that is flexible and technology-neutral, promotes transformative uses, assists innovation and better aligns with reasonable consumer expectations.<sup>56</sup>

9.44 Chapter 4 discusses how introducing fair use is consistent with the framing principles that have informed this Inquiry. Quotation lies at the heart of the concept of fair use and the recommendation to include quotation as an illustrative purpose is also consistent with these principles.

---

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

52 COMPPS, *Submission 634*.

53 AFL, *Submission 717*; Cricket Australia, *Submission 700*.

54 Australian Film/TV Bodies, *Submission 739*; Australian Copyright Council, *Submission 219*.

55 Australian Film/TV Bodies, *Submission 739*. The three-step test is discussed in Ch 4.

56 See Ch 4.

9.45 While quotation is not listed as an illustrative purpose in the US *Copyright Act 1976* (US), it is listed in the Israeli fair use provision,<sup>57</sup> and the term is used in the proposed United Kingdom quotation exception, without being limited to a particular purpose.<sup>58</sup>

9.46 Expressly providing more scope for quotation in Australian copyright law will ensure that Australia complies with art 10(1) of the *Berne Convention*, while continuing to comply with the three-step test.<sup>59</sup>

9.47 Providing quotation as an illustrative purpose may also be criticised on the basis that without further reference to a particular purpose, such as criticism or review, the term quotation may lack sufficient meaning. That is, without further context it may refer simply to the act of using any part, rather than the whole, of a work.

9.48 This point echoes fears that the concept of quotation may, in some way, supersede that of substantiality as the threshold for infringement. In the ALRC's view, however, this should not be a concern.

9.49 The High Court, in *Network Ten Pty Ltd v TCN Channel Nine*, in considering the appropriate scope of copyright protection of a television broadcast, reaffirmed the importance of keeping separate the concepts of substantial part and fair dealing. That is, copying does not constitute an infringement, and the defences of fair dealing do not come into operation, unless a substantial part is copied.<sup>60</sup> This reasoning would apply to a fair use or fair dealing exception where a quotation is at issue.

9.50 The 'quotation right' provided for by the *Berne Convention*<sup>61</sup> is not limited to text-based copyright material. Professor Kathy Bowrey observed that the 'ordinary meaning of quotation is primarily understood in relation to textual and verbal practice' and suggested that the wording of the illustrative purpose should be extended to state 'quotation and illustration'.<sup>62</sup>

9.51 The ALRC considers that it is unnecessary to introduce the term 'illustration' as courts will be readily able to adapt understandings of quotation to non-literary material—in the same way that the High Court observed that questions of the quality of what is taken can include the 'potency' of images or sounds.<sup>63</sup>

---

57 *Copyright Act 2007* (Israel) s 19(a).

58 Intellectual Property Office (UK), *New Exception for Quotation* (2013).

59 *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), art 9(2). The implications of art 10(1) are discussed in more detail below, in relation to a fair dealing for quotation exception.

60 *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273, [21].

61 Ricketson has noted that due to the mandatory character of the exception, 'article 10(1) is the one *Berne Convention* exception that comes closest to embodying a "user right" to make quotations': S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 788–789.

62 K Bowrey, *Submission 554*.

63 *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273, [47].

9.52 The ALRC recommends that ‘quotation’ be one of the illustrative purposes listed in the fair use provision. This will signal that a use for quotation is more likely to be fair than a use not for quotation. However, all the fairness factors must be considered in determining whether a particular use is fair. As discussed in Chapter 5, the fact that a particular use falls into, or partly falls into, one of the categories of illustrative purpose, does not necessarily mean the particular use is fair. It does not even create a presumption that the use is fair. A consideration of all the fairness factors remains necessary in determining whether the use is fair.

### **Fair dealing for the purpose of quotation**

9.53 The ALRC recommends that, if fair use is not enacted, the *Copyright Act* should be amended to introduce a new fair dealing exception. This would combine existing fair dealing exceptions and introduce new prescribed purposes, including ‘quotation’, which may be held to be fair dealing.

9.54 The following section discusses whether, in view of the *Berne Convention* and in the light of proposed Australian and UK formulations of a quotation exception, any additional matters should be included in a fair dealing for quotation provision.

### **The *Berne Convention* and quotation**

9.55 Article 10(1) of the *Berne Convention* provides:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.<sup>64</sup>

9.56 Commentators have suggested previously that art 10(1) of the *Berne Convention* could be considered as the basis for new exceptions permitting quotation in commercial works,<sup>65</sup> or fair dealing for the purpose of quotation.<sup>66</sup>

9.57 Article 10(1) is generally considered to impose an obligation to provide an exception for fair quotation.<sup>67</sup> That is, unlike the other exceptions provided for under the *Berne Convention*, fair quotation is framed as a mandatory provision, as ‘something that must be provided for under national laws, rather than as something that may be done at the discretion of national legislators’.<sup>68</sup>

9.58 The *Berne Convention* does not place any limitation on the amount that may be quoted under art 10(1), provided it does not exceed that justified by the purpose.

---

64 *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).

65 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

66 E Adeney, ‘Appropriation in the Name of Art: Is a Quotation Exception the Answer?’ (2013) 23(3) *Australian Intellectual Property Journal* 142.

67 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 783. This interpretation was contested by some stakeholders: ARIA, *Submission 241*.

68 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [16.100].

Ricketson and Ginsburg state that, in some circumstances, quotation of a whole work may be justified.<sup>69</sup>

9.59 The ‘quotation right’ provided for by the *Berne Convention*<sup>70</sup> is not limited to text-based copyright material. The word ‘works’ is used to encompass all the types of works that are listed in art 2. That is, literary and artistic works (including, for example, dramatic works, choreographic works, cinematographic works and photographic works), derivative works (including translations, adaptations and arrangements of music) and collections of works such as anthologies and encyclopaedias.

9.60 In contrast, COMPPS and the AFL considered that a fair dealing exception for quotation should not apply to all copyright material. COMPPS stated, for example, that there is ‘no legitimate reason for unlicensed third parties to be able to use audio, audio visual or photographic content for quotation purposes’.<sup>71</sup>

9.61 The text of art 10(1) makes it clear that a quotation must meet three requirements to be permitted under the provision.<sup>72</sup> These are, first, that the work in question must have been ‘lawfully made available to the public’; secondly, that the making of the quotation must be ‘compatible with fair practice’; and, thirdly, that the extent of the quotation must ‘not exceed that justified by the purpose’. Questions may be raised about whether these criteria should be incorporated in any new exception covering quotation.

9.62 The first requirement, that the work be ‘lawfully available to the public’, is not a requirement of existing fair dealing exceptions under the *Copyright Act*. The art 10(1) requirement includes the making available of works by any means, not simply through publication.<sup>73</sup>

9.63 Ricketson and Creswell observe that, while the fair dealing for criticism or review exception in s 41, for example, does not distinguish between published and unpublished works as ‘it seems clear from the cases that an unauthorised dealing with an unpublished work will not often be regarded as “fair”, particularly if the greater part or the whole of the work is reproduced’.<sup>74</sup>

69 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 788. For example, representative pictures of particular schools of art in a text on the history of art, or cartoons or short poems where quoted in a wider work of commentary or review: 788.

70 Ricketson has noted that due to the mandatory character of the exception, ‘article 10(1) is the one *Berne Convention* exception that comes closest to embodying a “user right” to make quotations’: *Ibid*, 788–789.

71 AFL, *Submission 717*; COMPPS, *Submission 634*.

72 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) Vol I, 785–786.

73 ‘Thus, if a dramatic or musical work is performed in public or broadcast, Article 10(1) should permit the making of quotations from it by a critic or reviewer who takes down passages verbatim for use in his or her review’: 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, 12.

74 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.50].

9.64 In any case, there seems to be no need to limit a fair dealing for quotation exception to material lawfully available to the public, as the requirement under the *Berne Convention* should be seen as providing the minimum scope of a quotation exception. There is nothing to prevent a broader exception, within the confines of the three-step test.<sup>75</sup>

9.65 The second and third requirements are, in the ALRC's view, satisfied by the recommended fairness factors, whether these are incorporated in fair use or new fair dealing exceptions. As discussed in Chapter 4, the ALRC considers that its recommended fair use exception (and fairness factors) are consistent with the three-step test.

9.66 The concept of 'fair practice' can be seen as essentially applying the three-step test. Ricketson observes that these criteria, in art 9(2), appear to be equally applicable in determining whether a particular quotation is 'fair'.<sup>76</sup> The requirement that the extent of the quotation must 'not exceed that justified by the purpose' is implicit in the fairness factors. In this regard, Ricketson observes that art 10(1) could cover 'much of the ground' that is covered by fair use in the US.<sup>77</sup>

### **Framing a quotation exception**

9.67 A number of models for framing an Australian quotation exception have been suggested. For example, in 2011, the Copyright Council Expert Group discussed an exception permitting the quotation of copyright material in commercial works, before recommending the development of a non-commercial transformative use exception.<sup>78</sup>

9.68 Associate Professor Elizabeth Adeney has proposed draft clauses providing fair dealing exceptions for quotation.<sup>79</sup> The exceptions would provide that a use would not constitute copyright infringement if:

- it is for the purpose of quotation;
- the quotation constitutes a fair dealing with the quoted material; and
- sufficient acknowledgement of the quoted material is made.

75 The Australian Copyright Council observed that, if a new fair dealing exception for quotation went beyond the parameters of art 10(1) of the *Berne Convention*, it would still be necessary to establish that it was for 'certain special cases' within the meaning of the first limb of the three-step test: Australian Copyright Council, *Submission 219*.

76 See, eg, 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, 13.

77 See, eg, *Ibid*, 13.

78 Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011), 2.

79 E Adeney, 'Appropriation in the Name of Art: Is a Quotation Exception the Answer?' (2013) 23(3) *Australian Intellectual Property Journal* 142, 156. Her model provides for separate exceptions in relation to: (i) reproductions and communications of works; and (ii) and performances of works.

9.69 Both provisions would also provide a list of discretionary matters to consider in determining whether the use of a ‘quotation’ satisfies ‘fair dealing’. These include:

- whether the quotation has been used in good faith;
- the extent of the quotation and whether or not this exceeds the purpose for which the quotation is used;
- the degree to which the quotation interferes with the commercial interests of the copyright owner of the quoted work; and
- whether the use of the quotation furthers the community interest in free speech and the freedom of artistic expression.<sup>80</sup>

9.70 Adeney considers that any exception for quotation would have to address a number of complexities, including whether the provisions should apply only to published works; how ‘quotation’ is to be defined; and how an exception for quotation would interact with other fair dealing exceptions.<sup>81</sup> She states that specific exceptions for quotation

would support or extend other fair dealing arguments in the areas of scholarship and debate and, like the recently implemented exception for parody and satire, it would have the capacity to soften the impact of copyright in the arts sphere. This capacity would be strengthened if a consideration of the freedom of art were to be mandated, going to the question of fair dealing in the quotation context. The defence would also bring Australian copyright law into closer alignment with both the European jurisdictions and the *Berne Convention*/TRIPS requirements.<sup>82</sup>

9.71 A simpler model is provided by a proposal in the UK, released in the form of draft legislation by the Intellectual Property Office in 2013.<sup>83</sup> The UK Government intends to amend its fair dealing exception for criticism and review, reframing it as a quotation exception for purposes such as, but not limited to, criticism and review.

9.72 The stated aim is to ensure that copyright ‘does not unduly restrict the use of quotations for reasonable purposes that cause minimal harm to copyright owners, such as academic citation or hyperlinking, without undermining the general protection provided for copyright works’.<sup>84</sup>

The exception permits the use of a quotation from a work for purposes such as criticism and review. In one dimension this slightly narrows the current criticism and review exception by permitting use only for the purpose of quotation. In another it slightly widens it by allowing such quotations to be used for purposes other than, but similar to, criticism and review.<sup>85</sup>

9.73 The proposed UK model would be narrower in some respects than the Australian fair dealing for criticism or review exception—in requiring that the

---

80 Ibid, 156.

81 Ibid, 158.

82 Ibid, 159.

83 Intellectual Property Office (UK), *New Exception for Quotation* (2013), [1].

84 Ibid, [2].

85 Ibid, [5].

copyright material has already been ‘lawfully made available to the public’; and excluding uses not ‘in accordance with fair practice’ or beyond the extent required by the specific purpose. As discussed above, these requirements are set out in art 10(1) of the *Berne Convention*.<sup>86</sup>

9.74 Australian Film/TV Bodies considered the UK proposal to be ‘unsatisfactory’, and stated that without limits on the purposes for, and extent to which, quotations may be used, the model ‘runs the risk of exempting, on [a] discretionary fairness basis, any act of using part, rather than the whole, of a work’.<sup>87</sup>

9.75 Other stakeholders also expressed concern about the scope of a quotation. The National Association for the Visual Arts stated that a quote should be defined to relate to a part, and not the whole of a work.<sup>88</sup> In contrast, Adeney states that her exceptions would allow the taking of the whole material under certain circumstances because ‘where the source material is short, or where what is quoted is a picture or photograph, quotation of only part of the material is unlikely to fulfil the purpose that the quoting party wishes to achieve’.<sup>89</sup>

9.76 The Queensland Law Society noted that the ordinary meaning of quotation involves ‘no purposive, qualitative or quantitative limitation’. The Society submitted that without some context, an exception based on quotation ‘might evolve to be broader than may be intended’ and that any defence should be ‘framed by reference to a quantitatively and qualitatively reasonable act which is for the purpose of acknowledging the original or some circumstance or person connected with the original’.<sup>90</sup>

9.77 In contrast, Associate Professor Mathew Rimmer has written that the term ‘quotation’ alone may be too restrictive. He stated that the term is ‘somewhat anachronistic, and does not necessarily capture a full range of transformative uses—such as forms of digital sampling, remixes, and mash-ups’.<sup>91</sup>

9.78 Some formulations of the concept of a quotation attempt to provide more clarity. Adeney defines ‘quotation’ for the purposes of her proposed quotation exception as being ‘for the purpose of supporting an intellectual commentary or artistic idea contained in the quoting work or other subject matter’.<sup>92</sup> She explains that the idea of the quotation ‘supporting an intellectual commentary’ covers the use of quotations in most contexts and states that the ‘notion of supporting an artistic idea expresses the

86 See also art 5(d) of the EU *Copyright Directive: Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, (entered into force on 22 June 2001).

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

88 NAVA, *Submission 655*.

89 E Adeney, ‘Appropriation in the Name of Art: Is a Quotation Exception the Answer?’ (2013) 23(3) *Australian Intellectual Property Journal* 142, 156.

90 Queensland Law Society, *Submission 644*.

91 M Rimmer, ‘An Elegy for Greg Ham: Copyright Law, the Kookaburra Case, and Remix Culture’ (2012) 17(2) *Deakin Law Review* 383, 405.

92 E Adeney, ‘Appropriation in the Name of Art: Is a Quotation Exception the Answer?’ (2013) 23(3) *Australian Intellectual Property Journal* 142, 156. That is, the quotation ‘must be distinguishable as such within the quoting work or subject matter and must be subsidiary to the quoting work or subject matter’.

need for the quoting work to have its own artistic logic and intellectual structure into which the quotation is interpolated in a supportive role'.<sup>93</sup>

9.79 A final issue in framing a fair dealing for quotation exception concerns the role of acknowledgement. The existing fair dealing exceptions in ss 41, 42, 44, 45, 103A and 103B of the *Copyright Act* require 'sufficient acknowledgement' to be made of the copyright material used. The models for a quotation exception discussed above include such a requirement.

9.80 Some stakeholders submitted that any new fair dealing for quotation exception should also require sufficient acknowledgement.<sup>94</sup> In contrast, Robert Xavier suggested that there should not be any 'express requirement for attribution as a threshold test' in a quotation exception, because

Attribution will be required by the moral rights provisions and it is appropriate that the attribution requirement be subject to the reasonableness defence, as it is not always necessary to provide express attribution (for example, where the identity of the original author will be obvious to the audience of the work in which the quote is used).<sup>95</sup>

### **Fair dealing and quotation**

9.81 Quotation should be considered under the recommended fair use exception where a range of factors can be balanced in determining whether a particular use is permitted.

9.82 The ALRC also recommends that, if fair use is not enacted, the *Copyright Act 1968* (Cth) should be amended to introduce a new fair dealing exception that would combine existing fair dealing exceptions with new fair dealing provisions.<sup>96</sup> This new fair dealing exception should include quotation as a prescribed purpose, which may be held to be fair dealing. This quotation exception should supplement, and not replace, any of the existing fair dealing purposes, such as criticism or review.

9.83 The exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the fair use exception. Applying the two exceptions to instances of quotation should, therefore, produce the same result. However, there will be some transformative uses of copyright materials that are not quotation, in that there is no attempt to reference the original work. These may be protected by the fair use exception, but not by a fair dealing quotation exception.

9.84 The ALRC does not consider that it is necessary or desirable to further define the term 'quotation'. The term alone is adequately understood and any attempt to define it would run the risk of introducing new complexity without any additional

---

93 Ibid, 156–157.

94 NAVA, *Submission 655*; International Association of Scientific Technical and Medical Publishers, *Submission 560*.

95 R Xavier, *Submission 531*.

96 See Ch 6.



benefit. Neither the UK proposal nor the Israeli fair use provision provide any further definition of the term.

9.85 The ALRC considers that a new fair dealing for quotation exception does not need to expressly include a requirement of sufficient acknowledgement. Acknowledgement is a matter that can be taken into account under the fairness factors.

9.86 As discussed in Chapter 5, whether or not the source of the copyright material used is acknowledged, and the extent of the acknowledgement, may be a factor in a fair use determination—for example, in considering the ‘purpose and character of the use’ under the first fairness factor. The moral rights provisions also require attribution of authorship and performership in many circumstances.

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

