

Australian Associated Press Pty Limited's response to the Commonwealth Government's Australian Law Reform Commission Issues Paper:

COPYRIGHT AND THE DIGITAL ECONOMY

1. EXECUTIVE SUMMARY

- 1.1 Australian Associated Press (**AAP**) welcomes the opportunity to submit a response to the Commonwealth Government's Issues Paper entitled *Copyright and the Digital Economy* (**Issues Paper**).
- 1.2 The Australian Law Reform Commission (**ALRC**) Inquiry takes place in the context of the developing digital economy and the Government's objective of ensuring that copyright law provides incentives for investment in innovation and content while also allowing appropriate access to that content in the digital age. The Issues Paper seeks to inquire into the current and further desirable uses of copyright material in the digital economy.
- 1.3 AAP's submission addresses 3 main areas of the Issues Paper, namely:
 - (a) fair dealing exceptions (questions 45,46 and 47);
 - (b) fair use (questions 52 and 53); and
 - (c) contracting out (questions 54 and 55).
- 1.4 AAP notes that it may supplement its submissions on these questions or address additional questions following the release of the Discussion Paper by the ALRC.
- 1.5 While new technologies can present challenges to the copyright system established under the *Copyright Act 1968* (Cth) (**Copyright Act**), AAP believes that the current copyright law continues to be fit for purpose in the digital age. Any efforts substantially to change or weaken copyright laws need to be supported by clear and strong evidence that such change is required. Judicial interpretation of the Copyright Act has ensured that copyright laws have been applied with relevance over the years to deal with changing technology and will continue to do so as the digital economy advances. Recently, for example, we have seen superior courts apply the provisions of the Copyright Act in relation to peer-to-peer file sharing services¹, an online television recording service² and an online news monitoring service³.

¹ *Roadshow Films Pty Ltd v iiNet Limited* [2012] HCA 16.

² *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59. On 7 September 2012, the High Court of Australia refused special leave to appeal the Full Court's decision: see *SingTel Optus Pty Ltd v Australian Rugby Football League Limited* [2012] HCATrans 214.

- 1.6 It is AAP's position that the current fair dealing exceptions in the Copyright Act continue to be appropriate in the current digital environment and that no changes should be made to the current exceptions and no new exceptions need to be created, including for quotations.
- 1.7 Further, given that the fair dealing exceptions remain appropriate, there is no need for the introduction of the concept of 'fair use' into Australian copyright law.
- 1.8 In relation to contracting out, the Copyright Act should not be amended to prevent contracting out of the existing exceptions. AAP supports parties' freedom to contract and believes that, to the extent that there is any concern with contracting out, there are adequate safeguards in place (i.e. protections afforded under the *Competition and Consumer Act 2010* (Cth) and other sources of law).

2. OVERVIEW OF AUSTRALIAN ASSOCIATED PRESS (AAP)

- 2.1 AAP has been an integral part of the Australian media landscape for 76 years, providing the foundation of news content for newspapers, radio news and talkback programs, television news bulletins and more recently the digital incarnations of all of the above.
- 2.2 The mode of delivery has changed during this time but its principles at inception remain at its core today.
- 2.3 AAP was established in 1935 by 13 of the country's leading newspapers as a means of gathering news and information that could be shared between them. Twelve of those 13 original owners are still the owners of AAP today. A means to reduce editorial costs within these operations, media organisations united to create an independent news resource they could trust to get it right, deliver it efficiently and without political bias. It was always intended to be a precious central news resource.
- 2.4 This remains true in 2012, however, the media landscape in the intervening years has changed dramatically. Those founding newspapers are still AAP owners but they are in turn owned by diverse media companies.
- 2.5 The news from AAP remains independent, accurate, balanced and completely free of political agendas and it finds its way to all media platforms.
- 2.6 News from AAP comes in the form of words, images, sound and video. AAP's news services are drawn from the world's leading agencies and its own correspondents at home and abroad. This ensures a breadth of coverage which would not otherwise be available in Australia.
- 2.7 The news is offered to Australian media on a subscription basis. Virtually all major Australian media entities are subscribers to the service.
- 2.8 Relevantly, AAP is in the position of being both a content producer (and, as such, a copyright owner) and a content user or licensee. For this reason, it is acutely aware of the necessity for a balance to be struck between the interests of both groups and

³ *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984.

is particularly well placed to provide a balanced perspective on the need for any reform.

3. FAIR DEALING EXCEPTIONS

- 3.1 Above all, AAP seeks a regime which provides certainty to both content producers and users regarding their respective rights. Certainty in the law is critical and can provide numerous benefits, including reduced costs in connection with legal risk.
- 3.2 As a content producer, AAP values a system which protects the value of investment made in the creation of copyright works and provides mechanisms to enforce rights against infringements.
- 3.3 AAP is also a content user under licence and also by virtue of the fair dealing exceptions. It therefore requires certainty for these arrangements without the need for constant amendment to copyright laws.
- 3.4 In AAP's experience, the existing fair dealing exceptions have generally worked well and continue to have the support of both content producers and users. The current exceptions, as drafted, together with the guidance provided by judicial interpretation of these exceptions, provide sufficient certainty as to the respective rights of content producers and users. The existing exceptions also strike an appropriate balance between the interests of copyright owners and those who have a legitimate basis for using copyright material without consent.
- 3.5 Accordingly, AAP does not believe there is any need to make changes to the fair dealing exceptions.

Simplification

- 3.6 AAP cautions against attempts to simplify the existing fair dealing exceptions, whether by consolidation of the exceptions, repeal of certain provisions or otherwise.
- 3.7 To illustrate, take the consolidated statutory provision for fair dealing proposed by the Copyright Law Review Committee (**CLRC**) and extracted at paragraph 253 of the Issues Paper. It represents an amalgamation of:
 - (a) the fair dealing uses recognised at the time;
 - (b) the matters listed in s 40(2) (relating to the research or study exception) and s 248A(1A) (relating to indirect sound recordings of performances); and
 - (c) the "fair use" exception under US copyright law (which is discussed in further detail in section 4 of these submissions).
- 3.8 Even leaving aside all criticisms of the fair use exception and the fact that the proposed provision is outdated, such a consolidated provision:
 - (d) fails to take into account the nuances of each of the fair dealing exceptions. For instance, the provision makes no reference to the requirement to provide sufficient acknowledgement in respect of uses for the purpose of criticism or

review (s 41), or for the purpose of, or associated with, the reporting of news in a newspaper, magazine or similar periodical (s 42). The alternative would be to make allowance for each and every nuance of the exceptions, which would result in an extremely complicated provision that seeks to “capture all”.

- (e) in the process of consolidation, omits certain language which risks inadvertently changing the meaning of the fair dealing exceptions. For instance, the provision refers to the “purposes of...reporting of news”, whereas the language in s 42 is “purpose of, *or associated with*, the reporting of news...”. Although apparently insignificant, this could require a reinterpretation of the exception by the courts and a material diminution in the value of the exception.

3.9 Accordingly, given that the provisions are functioning well and any improvement would, at best, be marginal, and in light of the risks associated with simplification (including those identified at paragraph 3.8(a) – (b) above), AAP believes that attempts to simplify the existing provisions will risk generating unnecessary confusion and uncertainty around the fair dealing exceptions.

Quotation

3.10 AAP does not support the introduction of a new exception permitting the quotation of copyright works in commercial works or an exception for fair dealing for the purposes of quotation.

3.11 The concept of an exception for fair dealing for the purposes of quotation is hardly new. AAP understands that the exception was first formally introduced into the *Berne Convention* through the *Brussels Act* in 1948. This was, of course, well before the enactment of the Copyright Act and the fair dealing exceptions.

3.12 It is also noted that the 2005 *Fair Use Review* encompassed a review of fair use and other copyright exceptions, which led to the introduction of a fair dealing exception for the purposes of satire and parody. The *Fair Use Review* made no mention of a fair dealing exception for the purposes of quotation.

3.13 This begs the questions, why introduce the exception now? What aspects of the digital economy in its current form have given rise to a need for the introduction of such an exception?

3.14 Further, as a matter of principle, an exception for the purposes of quotation appears to be fundamentally inconsistent with the existing exceptions. The existing exceptions are purposive, as noted in paragraphs 240-241 of the Issues Paper. However, it would be inaccurate to characterise “quotation” as a purpose. In reality, it is simply the reproduction of part of a work which may serve or be associated with a variety of purposes.

3.15 Moreover, AAP regards the existing substantiality threshold pursuant to s 14 the Copyright Act as already striking a balance between the interests of content producers and users. The introduction of an exception for fair dealing “for the purposes of quotation” would undermine the threshold and unjustifiably tip the

balance in the favour of content users and erode the value of the copyright owner's work.

- 3.16 From a practical point of view, the introduction of such an exception would seriously jeopardise the value of the copyright works that AAP creates. For example, a user would be able to use a quote from the AAP newswire within seconds of its publication on the newswire on the basis that it is a quotation and hence an exception to copyright law. This would have an enormous impact on the ability of AAP to sell some of its products and services to clients who could arguably lift a comment from an article rather than license the service containing the articles. In those circumstances, a very real risk emerges to the viability of news service providers such as AAP.
- 3.17 It is also worth noting that the existing fair dealing exceptions, in particular use for criticism and review, and use for or associated with the reporting of news, provide adequate scope for the use of quotes (in relation to those purposes).
- 3.18 In any event, AAP has reviewed the report released by the Copyright Council Expert Group in 2011 entitled, *Directions in Copyright Reform in Australia* which is cited in support of the proposition that Article 10(1) of the *Berne Convention* "could be usefully employed in Australia as the basis for... an exception permitting the quotation of copyright works in *commercial works*" (emphasis added). AAP does not accept that the report supports this proposition. Rather, the discussion of Article 10(1) is very much in the context of an exception for non-commercial transformative use only.

4. FAIR USE

- 4.1 AAP does not support the introduction of a broad and flexible fair use exception (whether modelled off the US fair use doctrine or otherwise) to replace or supplement the existing fair dealing exceptions.
- 4.2 A broad and flexible 'fair use' exception would require an open ended model, like the one used in the US. Such an open ended model would lead to greater uncertainty in the short and medium terms
- 4.3 In that regard, AAP endorses some of the arguments against an open ended model noted at page 77-78 of the Issues Paper, including that:
 - (a) All of the case law on the fair dealing exceptions would immediately be open to reinterpretation with the need for litigation to determine the scope of the exceptions.
 - (b) Australian courts may also take a different view on the many issues that arise under the fair use exception, such that the exception as interpreted by an Australian court may not produce identical or even similar outcomes to, for instance, the US system.
 - (c) An open ended model of this kind is likely to increase costs for Australian businesses, including AAP, while the cases are litigated to determine the boundaries of the exception.

- 4.4 Moreover, AAP has serious reservations about whether introducing a broad fair use exception would produce a net benefit to the Australian economy.
- 4.5 A recent paper by Dr Barker of the Centre for Law and Economics Ltd is highly critical of the analysis behind research which suggests that a more flexible regime of copyright exceptions would contribute to economic growth and innovation in Australia.⁴ The paper focuses attention on the two reports released by the Australian Digital Alliance in September 2012 and prepared by Lateral Economics (LE) entitled:
- (d) 'Exceptional Industries: The economic contribution to Australia of industries relying on limitations and exceptions to copyright'; and
 - (e) 'Excepting the Future: Internet intermediary activities and the case for flexible copyright exceptions and extended safe harbour provisions'.
- 4.6. For instance, Dr Barker notes that LE's analysis ignores the fact that an expansion of the exceptions would erode demand in the market for copyright works and increase monitoring costs for content producers, which would in turn see reduced investment in copyright market.
- 4.7 AAP also notes that the Issues Paper points out that as a result of the *Fair Use Review*, the Government did not enact an open ended fair use exception as there was no significant interest supporting fully adopting the US approach and there were concerns expressed about compliance with the three step test set out in the US approach.

5. CONTRACTING OUT

- 5.1 As a content creator, it is AAP's position that greater certainty is provided by allowing businesses to create specific licence terms which properly relate to the content being licensed. Such licence agreements are reviewed by businesses on an ongoing basis to respond to changing business and client needs. Further, businesses are routinely licensing their content to new businesses in the digital economy with appropriate revenue streams for rights holders as well as appropriate protections for the rights holders' businesses. The Copyright Act should not be amended to prevent businesses from licensing the content they create.
- 5.2 AAP also reiterates the criticisms levelled by the Australian Copyright Council in its response to the CLRC's recommendation that, among other things, provisions excluding or modifying the fair dealing exceptions be rendered unenforceable. For instance, any contracting out of fair dealing exceptions by AAP in its licence agreements would need to be viewed in light of its agreements as a whole, which confer a number of benefits upon its licensees to which the licensees would not otherwise be entitled.
- 5.3 Further, as noted in the Issues Paper, the existing provisions of the *Competition and Consumer Act 2010* (Cth) may be sufficient to deal with any issues arising from contract terms that exclude the operation of the exceptions.

⁴ Dr G R Barker, *Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*, (2012).

6. CONCLUSION

6.1 AAP submits that:

- (a) The existing fair dealing exceptions outlined in the Copyright Act are appropriate in a digital environment.
- (b) Simplifying the existing provisions will risk generating unnecessary confusion and uncertainty around the fair dealing exceptions.
- (c) The introduction of a new exception permitting the quotation of copyright works in commercial works, or an exception for fair dealing for the purposes of quotation:
 - (i) is fundamentally inconsistent with the existing fair dealing exceptions;
 - (ii) would seriously undermine the value of AAP's copyright works; and
 - (iii) contrary to the suggestions in the Issues Paper, does not have the support of interested parties.
- (d) The introduction of a broad 'fair use' exception:
 - (i) creates legal uncertainty;
 - (ii) is not based on sound economic analysis, and
 - (iii) failed to attract sufficient interest as recently as 2005 when it was considered in the context of the *Fair Use Review*.
- (e) the Copyright Act should not be amended to prevent contracting out of the existing exceptions as the current provisions provide adequate protection for both copyright creators and users of content.

AAP

30 November 2012