



23 May 2013

Professor Jill McKeough
Lead Commissioner
Copyright and the Digital Economy – (IP 42)
Australian Law Reform Commission
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Dear Professor McKeough

Copyright and the Digital Economy (IP 42) and fair dealing

We are writing to you as a coalition of media organisations with an interest in preserving certain existing fair dealing provisions of the Copyright Act.

At the roundtable discussion with the galleries, libraries, archives and museums on 12 April, you indicated that your Discussion Paper on this reference, due in June, would be recommending an open ended "fair use" provision. While we welcome innovation in copyright reform, we are concerned that the Discussion Paper may propose to replace the existing fair dealing provisions on which media organisations rely, and subsume them into this new fair use provision.

As leading Australian media organisations, we wish to convey our opposition to any change to the existing fair dealing provisions for reporting the news, criticism or review, or parody or satire. Those provisions are frequently relied on in our industries and in our view, strike an appropriate balance of copyright interests. They are vital for the free flow of information and access to copyright material in the digital economy.

If these well-established and heavily used provisions are included within a "fair use" provision they will be open to re-litigation. This may unintentionally diminish their utility or add further restrictions on their operation.

We hereby request that your Discussion Paper does not propose to replace or alter the existing fair dealing provisions on which our reporters and producers rely. To do so risks reversing long-established precedent and industry practice which presently maximises public access to information and copyright material on all platforms.

We attach a brief summary of our position for your reference. We would be happy to discuss our views further at a round table meeting or otherwise individually with you and your team.

Regards

Lesley Power
General Counsel
Special Broadcasting Service
Corporation

Joan Warner
Chief Executive Officer
Commercial Radio Australia

Michael Millett
Director Corporate Affairs
Australian Broadcasting Corporation

1. Background – existing use of fair dealing provisions

Reporting the news (ss 42, 103B); criticism or review (ss 41, 103A)

As leading media organisations our reporters and content producers rely daily on the certainty and scope of the existing fair dealing provisions for reporting the news and criticism and review. These fair dealing provisions are of long standing and as you would be aware, have been the subject of various past cases.

As a result of these cases there is now, overall, a good industry understanding of the main parameters of these provisions. This common industry understanding allows the fast and efficient flow of information regarding local and international news reporting, sports reporting, current affairs, and critique and review of copyright material such as films, music, books and other material, for the overall benefit of the public and our economy.

Parody or satire (ss 41A and 103AA)

The addition of the parody or satire fair dealing provision in 2006 has also been welcomed by our organisations. It is regularly employed by comedians, cartoonists, bloggers and commentators to enhance a wide array of news satire, comedy, musical parodies and visual re-imaginings of images and photographs. Since its introduction in 2006, there has been strong use of this provision in the creation of new media content but no known test cases by copyright owners, indicating it is working well.

Technological neutrality

All three of these well used fair dealing provisions are technology neutral, meaning that they apply seamlessly to digital native or digitally distributed content, social media and emerging platforms.

2. Undesirability of subsuming all fair dealing provisions into an open ended fair use provision

We understand that you may be considering repositioning all fair dealing exceptions within a general “fair use” provision where the prior fair dealing exceptions would be cited as “examples” of uses that might be fair. This may be judged against a list of other criterion of what is “fair”. While we are not aware of the precise drafting of such a provision, our concerns with such an approach are threefold:

- every case litigating “fair use” may have a potential impact on every area of fair dealing. That is, the scope of the exception for “reporting the news”, for example, may be affected by an unrelated case considering what is “fair” in relation to use of copyright material for research or study. This may have unintended consequences disruptive to existing practices in our industry.
- Depending on what general “fairness” criteria might be expressly listed, or develop as a result of case law, this may apply new restrictions or qualifications to the operation of the three existing fair dealing exceptions we rely on.
- The introduction of a “fair use” provision may result in Australian courts relying more heavily on United States decisions on fair use to influence their judgments. This could also newly limit the scope of these fair dealing exceptions as they current exist in Australia.

While our organisations may differ individually (and we each reserve our position) on whether any additional “fair use” exceptions are warranted, we are united in wishing to preserve the fair dealing exceptions for reporting the news, criticism or review and parody or satire without alteration.