Professor Jill McKeough

Australian Law Reform Commission

GPO Box 3708

Sydney NSW 2001

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Dear Professor McKeough

**Response to Copyright and the Digital Economy Discussion Paper (DP 79)**

I am an Associate Professor in the Law Faculty at the University of Western Australia, however I do not write on behalf of the Law Faculty, but in my own capacity.

I support Proposal 4–1 of the Discussion Paper: “The Copyright Act 1968 (Cth) should provide a broad, flexible exception for fair use”, essentially for the reasons outlined in the discussion paper, which do not require repeating.

I have just three points to make, which I set out below.

**Do we need examples of fair use?**

I would recommend against listing inclusive illustrative purposes. They are merely examples of conduct; they do not necessarily mean the use is fair. In other words, they are not in fact examples of ‘fair use’, they are examples of parody, research quotation etc which, *if fair*, would fall within the exception. They are in any event also not inherently clear. There is still room for argument about what a ‘parody’ is for example. The qualifying conditions are and should be, the only fairness criteria.

Not only do the illustrative purposes contribute to the Act’s wordiness, there may be a temptation to look for, or unconsciously be influenced by, parameters implicitly cast by the listed factors. This is particularly unwelcome in a provision designed to be future proof. An explanatory memorandum or other secondary material, guidelines, etc could list them as illustrative examples to aid non-specialist interpretation of the fair use exception. Such guidelines should clarify that parody, etc are likely to fall within the exception *provided the use is fair*.

Interpretation will be informed by the fact of the previous fair dealing exceptions in any event, and by US jurisprudence. It is not necessarily desirable to look back to interpretations of the fair dealing defences by Australian courts, given that these have been largely unhelpful in explaining those defences. All of this points to the need to make a clean break and craft novel approaches to a new fair use defence. While some precedents may be useful in this process, they should not constrain an independent and fresh approach to a new exception.

**3 step test**

There is no difficulty complying with the three step test. In particular, a fair use exception would be a ‘special case’. There is an unsupported assumption that the reference to ‘special case’ requires some finely articulated, narrowly described exception which only applies rarely. Fairness itself is a ‘special case’. The fact that many types of uses may be fair is irrelevant and does not prevent compliance with the three step test.

In any event, the three step test was formulated at a time (1969) when the limitations of the test could not have been envisaged.

**Holistic reform**

While perhaps outside the scope of the ALRC’s terms of reference, broader reform and scrutiny is required. We can formulate the most perfectly finessed suite of exceptions which optimally balance user and creator rights, however they all turn to dust if a technological lock (supported by contractual controls) thwarts the exercise of rights afforded by the exceptions. Contract reform, competition scrutiny and appropriate market regulation are necessary to avoid the kind of frustration involved in not being able to lend my mother a book I’ve downloaded on Kindle without reading a 25 page contract I wasn’t even aware I had agreed to, surfing numerous ‘how to’ forums, and kicking the dog.

We should at least be able to do what we could do in the analogue world. In the analogue world I could lend my mother a book I had just purchased.

In this respect, I support proposal 17-1 of the discussion paper.

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Yours sincerely,

Jani McCutcheon