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Proposal 4-1:

I strongly support this proposal. Perceptions that any such change will create significant jurisprudential difficulties or business uncertainties are not well founded.

Nineteenth century UK law utilised a broad and flexible approach to determine the appropriate scope of rights that frequently referred to the concept of “fairness” and “fair use”. These concepts were perceived to be useful for helping determine the 'rights' and 'wrongs' of new practices and market segmentations that emerged with the maturation of print and related markets in the mid-late nineteenth century. This often forgotten jurisprudence is evident from a simple word search for the word “fair” in the first two treatises on copyright. Both texts also include numerous illustrative discussions of fairness concepts as developed in case law. See WA Copinger, The Law of Copyright in Works of Literature and Art, London, Stevens and Haynes, 1870; Sir TE Scrutton, The Laws of Copyright: an examination of the principles which regulate literary and artistic property in England and other Countries, London, J. Murray, 1883. Twentieth century copyright legislation, which utilised the term fair dealing instead of the fair use, was not designed to depart from this heritage or to constrain flexible approaches to judicial interpretation of rights.

Those who seek to make most of the distinction between US and UK law today invariably draw upon a narrow and technical interpretation that lacks historical reference to the underlying cultural logic and principles of copyright law as these developed throughout the western world coming to be reflected in Anglo-Australian copyright over several centuries. Objectors also undersell the capacity of our judiciary to thoughtfully reflect on current practices and contribute to the development of market ethics over time. Traditional common law methods allow for flexibility in application of legal principle, in turn allowing these principles to develop to accommodate social and technological change over time.

Digitisation has undoubtedly led to the need to rethink the current approach to fair dealing. A broad, flexible exception will better serve the requirement that copyright continue to adapt to meet current needs and emerging cultural practices.

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 organise and negotiate their copyright practice on the terms that they think are appropriate and reasonable. However the benefit of a new exception is that it has the capacity to render this decision-making more transparent and publicly accountable, using ordinary judicial processes.

Proposal 4-2:

Legislative interpretation requires an open-ended rather than a closed categorical approach for coherent jurisprudence, harmonious with existing law on infringement, to continue to develop. It is important to most explicitly relate the fair use exceptions, fairness factors and illustrative purposes to the underlying principles of infringement so that issues of fair use is not carved out as discordant or ‘exceptional’.

In my view, the infringement test looks to the surrounding circumstances of the making of the defendant’s work to determine the facts of causation and whether it is substantially similar to the plaintiff’s work. The proposed fair use exception looks beyond this finding to engage more explicitly with an explanation for the degree of similarity, when more than an insubstantial taking is evident. The ‘fairness factors’ and the ‘illustrative purposes’ mutually support each other. The former primarily serve to better elucidate motivational factors related to the creation of the defendant’s work and allow for critical reflection on the significance of that evidence, in view of current cultural and economic practices. The non-exhaustive list of illustrative purposes document established cultural practices that might generally be indicative of fair use, where the fairness factors are also met.

Proposal 4-3:

The proposed criteria are uncontroversial.

The proposed fairness factors cover terrain already familiar to existing fair dealing case law, where the concern is often submerged with discussion of whether or not a use falls within an existing category of fair dealing.  For example, “’Fair dealing’ in its statutory context refers to the true purpose (ie the good faith, the intention and the genuineness) of the critical work.” : Henry LJ in Time Warner Entertainment Co Ltd v Channel 4 Television Corporation PLC (1993) 28 IPR 459 at 468; cited with approval in Pro Sieben Media AG v Carlton UK Television Ltd and another [1998] All ER (D) 751.

It could be explicitly noted in the discussion of this provision that the point of a “fairness” assessment is to consider the motivation or purpose underlying the fair use claim, not because the intention or sincere belief of the defendant determines the matter, but because this information helps contextualize the broad cultural and economic issues at stake related to a particular instance of asserted fair use. The fairness factors are general in character, inclusive and forward looking. As such they provide a key for the law to accommodate for social and technological change, whilst allowing for consistency and justice in treating analogous cases alike.

The advantage of the proposed approach is that, in logically separating out the fairness factors from the illustrative purposes, it is easier for the public to identify the normative factors they need to consider to determine the legitimacy of their use, regardless of any idiosyncrasies associated with their individual practice.

Proposal 4-4:

Question 4-1:

The current list is comprehensive and consistent with comparative law in other jurisdictions. It is broad enough to meet contemporary expectations of kinds of fair use and, in conjunction with the fairness factors, to clarify the scope of the exceptions.

Question 4-2:

Proposal 6-1:

Question 6-1:

Proposal 7-1:

Proposal 7-2:

Proposal 7-3:

Proposal 7-4:

It is important to formally acknowledge the centrality of fairness to the notion of fair dealing and to clarify and strengthen the normative foundations of the existing jurisprudence by stating what the current law surrounding 'fairness' is, as developed over time.

There is no logical reason why the fairness factors should be limited to certain nominated kinds of fair dealing or be only considered or addressed in fair dealing cases in an ad hoc fashion. Further, it would be of some assistance to draw out clearer judicial statement as to what might be considered a fair or an unfair practice in a range of contexts. As only a small number of conflicts ever end up being litigated we rely upon a very small number of instances to educate the public as to acceptable standards. Being most explicit about the foundation of those standards serves the rule of law.

Proposal 8-1:

The current provisions are technically complex, poorly understood and because of their specificity in focusing on technical demarcation of the permitted activities, difficult to teach. The current legislative design significantly detracts from understanding the underlying principles that led to the policy decision to make these kinds of activities non-infringing. It is simpler and provides for a stronger normative foundation to copyright to deal with these exceptions on the same grounds as other kinds of fair use.

Proposal 8-2:

Proposal 8-3:

In a digital world it becomes possible to reduce copyright subject matter to mere data, however the foundation and logic of copyright is based on protection of original works and other nominated subject matter so that our culture is enriched through their creation and by having access to these kinds of cultural and expressive productions. Monetising incidental dealings with and forms of ‘technical copying’ of the data underlying copyright works serves no obvious cultural logic.

An exception for non-consumptive use, entailing a consideration of the fairness factors, will provide much needed flexibility allowing for judicial discrimination between those technological practices that also entail unfair free riding on the content being purveyed and others that are merely designed to facilitate efficiencies in delivery of data.

Proposal 9-1:

Proposal 9-2:

Proposal 9-3:

Proposal 9-4:

Proposal 9-5:

Proposal 10-1:

Many mash-ups and samples make use of artistic and musical works, often in incidental ways. These practices are not necessarily limited to the context of parody, satire or criticism and review. In respect of the argument that a proposed quotation exception potentially covers much of the same ground as transformative use (and as such there is no need for a specific provision for transformative works), it would be helpful to explicitly clarify that fair use for purpose of quotation is intended to cover transformative uses, in cases where the fairness factors are also met.

Proposal 10-2:

The inclusion of a right of quotation would be in compliance with Art 10(1) Berne Convention. Though the Berne Convention does not require a right of quotation to be limited to a literary context, the ordinary meaning of quotation is primarily understood in relation to textual and verbal practice.

The Macquarie Dictionary (5th edition) definition of “quotation” refers to:

Noun. 1. that which is quoted; a passage quoted from a book, speech, etc. 2. the act or practice of quoting. 3. Commerce. a. the statement of the current or market price of a commodity or security. b. the price so stated. 4. the statement of the current odds being offered in betting.

The OED definition of quotation is broader:

**5.** ***a.*** A passage quoted from a book, speech, or other source; (in modern use esp.) a frequently quoted passage of this nature. (quotations omitted).

**b.** A short musical passage or visual image taken from one piece of music or work of art and used in another.

1890. Times 9 May 10/2. The representation of the bridal ceremony .. reaches the extreme limits of what is permissible in instrumental music, but the quotation from a psalm of Marcello's is well introduced.

1938 Jrnl. Warburg Inst. ***2*** 185/1 This self-portrait of Reynolds might be another case of a ‘witty quotation’: a translation from a painting of Greuze.

1942 G. Abraham Beethoven's Second-period Quartets 42 A note-for-note quotation of a figure much used in the first movement of Mozart's great Quartet in C major, K.465.

1972 Jazz & Blues Oct. 26/3 Flashes of humour in the form of oblique quotations.

1994 K. Moxey Pract. Theory v. 96  A quotation of a painting..by..Michelangelo Caravaggio.

2002 N.Y. Times (National ed.) 25 Oct. b27/4 There are so many film quotations that, as handsomely rendered as they are by Tak Fujimoto's dexterous cinematography, [etc.].

If the more contemporary illustrations provided by the OED are taken into account, this definition may include some transformative uses and new media practices within the meaning of quotation. However if the Macquarie Dictionary definition was preferred as an interpretative aid it could limit the meaning of "quotation" to textual and verbal practice alone and arguably exclude quotation of audio visual or documentary sources. Forward-looking copyright legislation should strive to be more inclusive of cultural practices beyond those pertaining to words and texts.

It would be helpful to extend the proposed wording of the illustrative purpose to say “quotation **and illustration.”** The Macquarie Dictionary (5th edition) definition of “illustration” refers to:

Noun. 1. that which illustrates, as a picture in a book, etc. 2. a comparison or an example intended for explanation or corroboration. 3. the act of rendering clear, explanation; elucidation. 4. Rare. Illustriousness; distinction.

The inclusion of illustration in conjunction with quotation makes it clearer that the fair use envisaged here covers more than merely textual practice and encompasses analogous multi-media uses of quotation. The conjunction of “quotation **and illustration”** is more inclusive of contemporary media practice and more liable to be understood by the general public as intending not to be specifically limited to ordinary literary practices of quotation.

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Proposal 10-3:

Consistent with the comments above in 10.1 & 10.2 and with international obligation, there should be a fair dealing exception for quotation.

Proposal 11-1:

Proposal 11-2:

Proposal 11-3:

Question 11-1:

Proposal 11-4:

Proposal 11-5:

Proposal 11-6:

Proposal 11-7:

Proposal 12-1:

Given that owner permission is not required in the context of fair use, in most cases the user would not necessarily know that the work drawn on was, in fact, an “orphan work”. As such it is illogical to treat these instances of fair use differently to any other cases.

Proposal 12-2:

Due to the circumstances of the making of the work copyright ownership in Indigenous knowledge is often vested in a third party. Copyright practices of attribution can, in such cases, involve what is from an cultural perspective, a act of wrongful attribution that causes serious cultural offence. I have concerns that these provisions could undermine gains achieved in respect for Indigenous rights through the use of protocols surrounding cultural ownership..

To the extent that, within Australia, large institutional owners and collections are aware of and sensitive to these cultural issues, it is possible that concerns could be met through protocols concerning digitization practice and through raising the issue of indigenous cultural protocols as part of educating the public as to what is a ‘reasonably diligent search’.

Proposal 12-3:

Consistent with my response in 12.2, were collections to not make available digitized Indigenous material available to the public without permission this would minimize harms. Large publicly funded Australian institutional collections often adhere to Indigenous protocols and do not digitize Indigenous content without permission, have processes for complying with permissions granted and for removing access to previously available material when made aware of Indigenous owner claims. The international situation is less clear. However even when the copyright owner is known, it can be difficult for Indigenous people to negotiate over access. For example, one artist had his portfolio ‘gifted’ to the National Library by an art dealer, and was thereafter unable to access his own work, as access was denied to him by the art dealer, though the dealer granted permission for his unpublished artworks to be loaned out and put on public exhibition.

Any introduction of orphan works provisions provide an opportunity to better educate the public around these important and culturally sensitive issues. Relevant information on indigenous protocols and the sensitivities surrounding access to Indigenous knowledge would be a very useful addition to information provided by large institutional actors in the GLAM and university sector surrounding best practice in dealing with orphan works and with Indigenous knowledge.

Proposal 13-1:

Currently the Copyright Act supports self-education to some extent, providing a fair dealing exception for an individual’s right to research and study, as well as providing a framework for institutional providers of educational services, through numerous special provisions. Educational activities run the whole gamut between those that are informally organised and individualised, and those provided by large scale, government supported actors. In reality many educational uses fall in between these poles.

For example, in my local community there are regular ad-hoc organised workshops and community events educating the public about various subjects including environmental and sustainability practices, gardening information, human rights, craft and art instruction and in support of political advocacy for various causes. These educational sessions are often led by local citizens and provide a strong sense of community connection and local identity. As educational activities they have a ‘loose’ and ‘light’ organisational structure. Basic information sheets distributed are invariably sourced from third parties, including from like-minded individuals and group websites and public bureaucracies. When asked about the legality of distributing material currently one is obliged to advise that, without permission, or implied consent, it is not possible to print or otherwise distribute this material without infringing copyright. On the other hand, the chance of detection or legal action is exceedingly unlikely as there are no significant economic interests at stake here.

Copyright law’s education provisions have been crafted to meet the needs of those with the loudest voices and the biggest pockets. This can result in unequal and undemocratic treatment. There is a need for a more broadly based fair use for education exception, subject to the usual fairness principles, to better serve the educational interests and needs of the broader community.

Proposal 13-2:

Consistent with my answer to 13.1, I support this proposal.

Proposal 13-3:

Proposal 14-1:

Proposal 14-2:

Proposal 14-3:

Proposal 15-1:

Proposal 15-2:

Question 15-1:

Proposal 15-3:

Question 15-2:

Proposal 16-1:

Question 16-1:

Proposal 16-2:

Question 16-2:

Question 16-3:

Proposal 17-1:

Additional comments?:

File 1:

File 2: