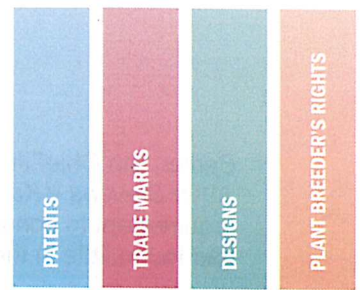




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Australian Law Reform Commission Discussion Paper 79 - Copyright and the Digital Economy

IP Australia thanks the Australian Law Reform Commission (ALRC) for the opportunity to provide comment on the discussion paper on Copyright and the Digital Economy.

IP Australia supports the Commission's proposals in the Discussion Paper that the *Copyright Act 1968* be amended to include a broad, flexible exemption for fair use, and that this fair use exemption should be applied when determining whether government use infringes copyright (proposals 4-1 and 14-1). IP Australia also supports the proposed nature of the fair use exemption (proposals 4-2, 4-3 and 4-4, in particular the inclusion of 'public administration' as an illustrative purpose).

As a corollary, should a fair use exemption not be adopted, IP Australia supports a new proposed exception for fair dealing for public administration (proposals 14-2 and 7-4). In either event, IP Australia agrees that the statutory licensing scheme in Part VII div 2 of the *Copyright Act* may no longer be necessary.

IP Australia believes that the ALRC's proposals strike an appropriate balance between the interests and needs of rights holders and the public. The fairness factors proposed by the ALRC will achieve such a balance by providing that use is likely not to be fair, and therefore protected, when it is commercial or has a market impact on the rights holder. The factors will also provide for the public interest and recognise the value to society of certain uses (such as government use) that are non-commercial and unlikely to affect the interests of the rights holder. IP Australia believes it is appropriate that governments have the ability to access and use copyright material for the purposes of good, efficient and transparent governance, where such use would not be likely to affect the rights holder unduly.

An attractive feature of the broad, flexible exemption for fair use is that it would represent one step towards clarifying the objectives of the Copyright Act. Intellectual property statutes should have clear objectives, for three reasons:

- Lack of clarity of objectives can lead to difficult, even unpredictable results when the resulting legislation is interpreted – meaning that the legislation may be applied in a manner not consistent with whatever the objectives were. In a 2012 address ['A Public Law Perspective on Intellectual Property – 4th Francis Gurry Lecture on Intellectual Property' 25 July 2012, University of Melbourne, Melbourne], Chief Justice French said:

Intellectual property is a product of public law reflecting competing interests and norms whose resolution must necessarily occur at the political, rather than at the judicial level. But the discernment of the balance that has been struck is not a straight forward matter. Where contested interpretations depend upon a view of where that balance is struck, the constructional choice may involve difficult judgements.

Earlier, the Chief Justice had reflected upon the joint judgement (Gleeson CJ, Gummow, Hayne and Heydon JJ) in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* and noted that it referred to the requirement to construe the Copyright act according to its underlying purpose or object but that the judges had found little in the way of useful indicators for the statutory purpose, saying:

Indeed, the very range of the extrinsic materials, with shifting and contradictory positions taken by a range of interest holders in the legislative outcome, suggests that the legislative purpose was to express an inarticulate (or at least not publicly disclosed) compromise.

Chief Justice French observed that the "difficulty of expressing an inarticulate compromise speaks, if I may say so, for itself".

No statute in such a complex area can ever be perfectly clear and unambiguous, but a diligent striving, to clarify what the objectives are, must surely over time promote the achievement of those objectives.

- Secondly, increasing complexity and lack of objective clarity in a statute can make it ever harder to resist stakeholders with a particular interest to argue that primacy should be given to their particular concern, thereby further eroding the possibility that the economic or other objectives of the legislation will be achieved without distortion or injustice.
- And thirdly, a lack of clarity of objectives undermines respect for the intellectual property system itself, further reducing the likelihood that it will deliver the benefits intended. In the speech referred to above, Chief Justice French said:

As a general proposition it is difficult to secure a respect for and enforce rights deriving from laws which lack moral clarity. A law has moral clarity when its public beneficial purpose is capable of explanation in relatively straight forward terms to those whom it binds. It is a fact of contemporary society that the complexity of some of our laws obscures their public purposes.

Two of the principles which the Commission adopts in its Discussion Paper are the maintenance of incentives for the creation of content and the promotion of fair access to, and wide dissemination of, content. Both these principles are very important. Free access to content will not be helpful if no content is being produced. Equally, the most powerful incentives to produce content will not be beneficial overall if that content is not usable on reasonable terms.

IP Australia – the need to explain our decisions

A little more detail about the particular situation in which we feel unable to freely use content might be helpful in demonstrating the case, either for a broad fair use exemption, or at least for a new exception for fair dealing for public administration.

IP Australia makes decisions about whether patents should be granted and also about the precise width of the monopoly right that is thereby created. It seems to us to be a fundamental aspect of public administration that we need to be able to fully articulate the reasons for our decisions so that they can be understood by the applicant, any potential opponent and other members of the public.

It is also an important aspect of our particular role in public administration that other IP offices should be able to have ready access to our decisions and all the reasons for our decisions. This facilitates the efforts of Australian exporters who, armed with a patent granted by IP Australia, seek to encourage an IP office in another country to grant a patent of similar scope.

At the moment, the primary tool we use for that is a web-based database called AusPat. On it, any member of the public or other IP office can see all the documents from our file, including the initial application, written exchanges between the examiner and the applicant (which may involve negotiating about the permissible scope of the patent) and our final decision with reasons.

The exception to this material being available occurs when our examiner has relied upon non-patent literature, such as a journal article. This might occur, for example, when the article revealed information to suggest that the applied for patent related to an invention that was not novel or was insufficiently inventive when compared with what was previously known. Because this material could be covered by copyright, we do not publicly display it on the AusPat database. Therefore, people viewing the database cannot immediately understand the full reasoning behind our decision. They *can* come to us as a separate transaction and apply for that particular document to be made available

to them and we will consider that application. But we could not justify an extensive investigative process in response to their application. We therefore have the practice of charging \$50 for such access (an amount which we reasonably estimate to cover costs on average) and even then only for documents like published journal articles, where we can be confident that a statutory licensing scheme is available. If the material is not obviously likely to be within a statutory licensing scheme, we refuse access, on the basis that the effort in tracing copyright ownership and securing permission would not justify the benefit to the applicant.

Clearly, publishing a document on the AusPat database will do little if any damage to the value of the copyright owner's right. People cannot and do not search journal articles by interrogating the AusPat database. At most, there will be situations where a copyright owner secures a very small additional royalty because of the application of the current rules. Against that minor benefit, there is quite a significant impact on our capacity to fully explain our regulatory decisions, upon the community's capacity to understand those decisions, upon Australian exporters' capacity to streamline as much as possible their path to export markets, and (finally and least importantly) a diversion of our resources to administer rules which in this particular case yield next to no advantage.

The situation I've just outlined is where the current rules lead us. Where should good policy lead us?

The more narrow approach contemplated by the Commission - a new exception for public administration - would suffice to meet our particular needs. But we are just one stakeholder with a particular need and we don't think that addressing particular needs of particular stakeholders is the best way to approach intellectual property law reform. Therefore we strongly endorse the Commission's preferred approach, involving a broader fair use doctrine.

Yours sincerely



Philip Noonan
Director General

