

Professor Jill McKeough  
Australian Law Reform Commission  
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Dear Professor McKeough

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

This letter is written in support of Proposal 4–1 of the Discussion Paper: “The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.”

We are academics located in universities and other institutions from around the world. Our names and affiliations are listed at the end of this letter, although we emphasise that we each speak in our personal capacities in signing this letter.

We wish to make the following points:

1. *Exceptions occupy an important place in the copyright system, constituting one of the key mechanisms by which the law recognises various interests of new creators, third parties and the public more generally in relation to the distribution and re-use of copyright works.*

1.1 Our starting point is that copyright policy should reflect the variety of ways that people create and engage with copyright works, for instance as authors, publishers, distributors, researchers, educators, consumers, and so forth. Just as it is important that the law protect the reasonable economic and non-economic interests of existing right holders and creators, so too is it important that it respect the legitimate interests of the new creators, third parties and the public in research and education, access to information, new authorship, fair competition, technological and scientific progress, and cultural, economic and social development.

1.2 With the expansion of owner rights over the years, free exceptions are one of the key ways that these public interests are supported. We therefore support a role for free exceptions that sees them play a meaningful part in the copyright system.

2. *An open-ended fair use exception allows the law to respect competing interests.*

2.1 We believe that fair use, as an open-ended, multi-factor standard, allows courts to assess in a holistic manner whether particular uses should be allowed without permission or payment, including the importance of the public interest served, whether such uses further the basic policy goals of copyright, and

whether such uses will interfere unreasonably with the copyright owner's market or other legitimate interests.

2.2 Fair use allows courts to take into account the interests of copyright owners and creators, and changing market conditions, including the availability of licensing options. It also allows recognition of important public interests such as access to information and culture, research and education, and freedom of expression.

3. *Fair use as proposed in the Discussion Paper can operate in a manner that is sufficiently foreseeable for right holders and third parties.*

3.1 We support Proposal 4–2 of the Discussion Paper in relation to the broad structure of an Australian fair use provision:

*(a) an express statement that a fair use of copyright material does not infringe copyright;*

*(b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and*

*(c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').*

3.2 Courts, copyright owners and users will have various sources of guidance on the meaning and scope of fair use: overseas case law; guidelines or codes of best practice developed to address the needs of specific creative communities and industries; the ALRC Report itself; academic and industry commentary, and so on.

3.3 The language of fairness – elaborated through the fairness factors – is readily understandable to everyday users and their legal advisors; far more so than the sometimes extraordinarily complicated language of specific exceptions or language derived from Art 13 of TRIPS.

4. *The three-step test does not preclude the introduction of open-ended exceptions like fair use.*

4.1 We agree with Item 3(a) of the *Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law* that the "certain special cases" limb of the three-step test "does not prevent legislatures from introducing open-ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable". We are therefore suspicious of any claim that an Australian fair use provision would contravene Australia's international copyright obligations.

4.2 Analysis of the history of the three-step test reveals that it was originally introduced into Art 9(2) of the Berne Convention because it was understood to be sufficiently broad to cover the gamut of existing domestic exceptions. It was

never intended to act as a restrictive test and should not be applied in such a manner.

4.3 It is important that any modern interpretation of the test have regard to the policies behind copyright law and exceptions, as noted above. It is inappropriate for the test to focus only on the interests of existing right holders and not of others who participate in the copyright system. As noted in Item 2 of the *Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law*, "the Three-Step Test does not require limitations and exceptions to be interpreted narrowly. They are to be interpreted according to their objectives and purposes."

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