



ALRC Inquiry: Copyright and the Digital Economy

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4 June 2014

Copyright and Digital Economy

- Inquiry announced October 2011
 - Terms of Reference June 2012
 - Issues Paper August 2012 (55 questions)
 - Discussion Paper 31 May 2013
 - Report 29 November 2013
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Context of Review

- ▶ The digital economy
 - ▶ Innovation and productivity
 - ▶ Consumer use of copyright material
 - ▶ Complexity of copyright law
 - ▶ Cultural issues and copyright law
 - ▶ Competition issues and copyright reform
 - ▶ Evidence and law reform
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Issues identified included

- ▶ Caching and indexing, cloud computing, private copying, social media use, transformative use, orphan works, data and text mining, crown use, retransmission, statutory licences, educational use, fair dealing and other free-use exceptions, contracting out, competition issues, cultural policy, regulatory policy, technology neutrality...
- ▶ A number of submissions were concerned that piracy, enforcement and internet service provider liability not within the TORs


And the Big one....fair use

- **Current law**
 - The *Copyright Act 1968* currently contains a number of exceptions to copyright infringement
 - Fair Dealing Exceptions
- **Proposal – replace fair dealing with fair use**
 - What does Fair Use mean?
 - The Standard – ‘is the use fair?’
 - What are the effects on business and consumers?

Another big one...

- ▶ Statutory licences
 - ▶ Questions about benefits explicitly raised by TORs
 - ▶ Heavily contested as between licensees and licensors
 - ▶ Everyone agreed that statutory licences could work better; inflexibility, lack of transparency, funds going overseas
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What does a successful digital economy look like?

- ▶ Characterised by constant innovation; does not stand still
 - ▶ Has the right regulatory environment (copyright law included)
 - ▶ Allows use of technology without too many barriers
 - ▶ Has good networking; allows business and individuals to 'flourish' on-line
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Success in the digital economy...

- ▶ Requires copyright law to recognise 'fair use' and transformative uses

OR

- ▶ Has already been perfected and any desirable outcome can only be achieved through monopoly control of copyright material

fair use – fairness factors

1. The purpose and character of use

- *includes consideration of whether the use was transformative, for the public interest or for a commercial purpose.*

▶ 2. Nature of the copyright material

- *includes consideration of whether material has been published, is in print and/or contains factual or entertainment content*


◦ 3. Amount and substantiality of the part used

4. Effect of the use upon the potential market or value

- *to help to ensure that the markets of the rights holders are not substantially damaged by the exception.*

fair use – fairness purposes

▶ There are 11 non-exhaustive illustrative uses (which include 4 existing exceptions):

1. research or study
 2. criticism or review
 3. parody or satire
 4. reporting news
 5. professional advice
 6. quotation
 7. non-commercial private use
 8. incidental or technical use
 9. library or archive use
 10. education
 11. access for people with disability
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fair dealing – defined purposes

- ▶ **Alternative proposal: Fair Dealing**
- ▶ The 11 illustrative purposes would be the new prescribed fair dealing exceptions

Ask:

- (i) does the use fall within one of these prescribed purposes; and if so
 - (ii) is the use fair?
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- ▶ **Difference**
 - Fair Dealing is prescriptive about the uses
 - Fair Use is more flexible

Specific exceptions

- ▶ Not subject to the ‘fairness’ test (just a good idea)
- ▶ The exceptions for preservation copying in ss 51A, 51B, 110B, 110BA and 112AA of the *Copyright Act* should be repealed. The *Copyright Act* should provide for a new exception that permits libraries and archives to use copyright material for preservation purposes. The exception should not limit the number or format of copies that may be made
- ▶ The parliamentary libraries exceptions in ss 48A, 50(1)(aa) and 104 of the *Copyright Act* should be extended to apply to all types of copyright material and all exclusive rights
- ▶ Government use: where access required by statute; correspondence sent to government; tribunals, royal commissions, statutory inquiries

incidental use – ALRC PROPOSAL

- Current uncertainty and inadequate protection
 - e.g. temporary uses and proxy web caching
 - Technical reproduction for cloud-based services
 - ‘incidental to primary use of a work’
 - Not trading on underlying or expressive use of work
- A fair use or new fair dealing exception should be applied

fair use: contracting out – ALRC PROPOSAL

The ALRC recommends:

Fair Use regime

- parties should be able to contract out of fair use exceptions.

Fair dealing regime

- parties should **not** be able to contract out of fair dealing exceptions.

orphan works – ALRC PROPOSAL

- Orphan works
 - owner cannot be identified or located
 - currently, use of works may infringe unless there is an exception or fair dealing defence.
- ALRC recommendations
 - if the owner is found, financial remedies are limited when:
 - there was a ‘reasonably diligent’ search for owner
 - author was attributed where possible

orphan works – diligent search

- ▶ **What is a ‘reasonably diligent’ search?**
- Non-exhaustive factors to be considered:
 - nature of material
 - how and by whom the search is conducted
 - technologies, databases and registries available
 - any relevant guidelines, protocols or industry practices
- ▶ **Financial remedies**
 - US Copyright Office model is ‘reasonable compensation’ for commercial uses, and no relief for non-commercial uses.
 - Assessment of damages and account of profits already provided for in the Copyright Act.


Retransmission – ALRC PROPOSAL

- What is retransmission?
- The current retransmission scheme:
 - No permission or payment to owner is needed
 - Statutory licence schemes for owners of underlying works
- ALRC discussed:
 - Repeal of the Copyright Act with regard to:
 - the retransmission scheme for Free To Air Broadcasts and specific broadcast exceptions
 - clarification of retransmissions over the internet
- Goals
 - technologically neutral copyright law
 - retransmission would be negotiable between parties

Uncertainty and business costs

- Uncertainty and business costs?
- Are there existing arrangements and agreements?
- Is fair dealing well understood now?


will the uncertainty be so great as to:

- lead to an increase in the amount of unauthorised use of protected materials?
 - create a situation where users are so unsure of their position they do not avail themselves of the fair use doctrine?
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How to know...

- Australian fair dealing decisions
- Foreign Jurisprudence:
USA, Israel and Canada
- Commentaries & Summaries
 - *Summaries of Fair Use Cases*–
fairuse.stanford.edu/overview
 - *Global Fair Use and Fair Dealing Decisions Available Online*– infojustice.org
- Codes & Guidelines/industry practice

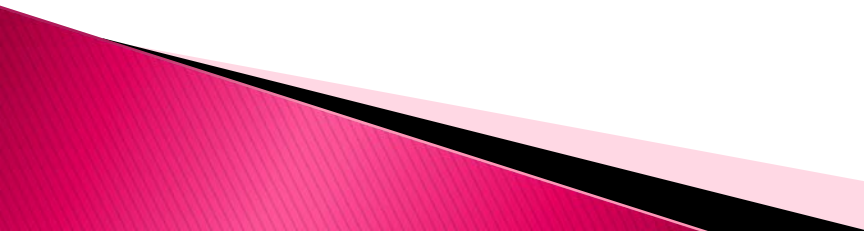
SUBMISSIONS

- ▶ Overall 870 public submissions
 - ▶ 139 confidential
 - ▶ Over 400 form letters – from teachers, including writers of educational materials (109 were confidential)
 - ▶ 20 form letters from publishers (around the world)
 - ▶ Surveying firms – cadastral plans
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Criticism of ALRC process

- ▶ Advisory Committee 'biased' (We disagree)
- ▶ Anti-commercial bias / conflict of interest / misleading content (we disagree)
- ▶ 24 people on Advisory Committee
- ▶ A number of senior legal practitioners, two regulatory economists, representatives of copyright owners, academics, experienced industry participants
- ▶ Three part-time commissioners (Federal Court judges). Altogether 5 current or former judges, all very experienced in IP

Copyright is very messy

- ▶ Too complex and need expensive advice to know how it works
 - ▶ Not a sustainable model, relevant change needed
 - ▶ The Act is very unwieldy – larger than tax or corporations legislation
 - ▶ ‘Exceptions’ to rights are all over the place
 - ▶ Much complexity results from reform decisions being reached in an ad hoc manner, in relation to specific exceptions, rather than being underpinned by any widely accepted principles.
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Difficulties with reform

▶ Transaction costs

Disruption to licensing arrangements in place

Renegotiation of contracts

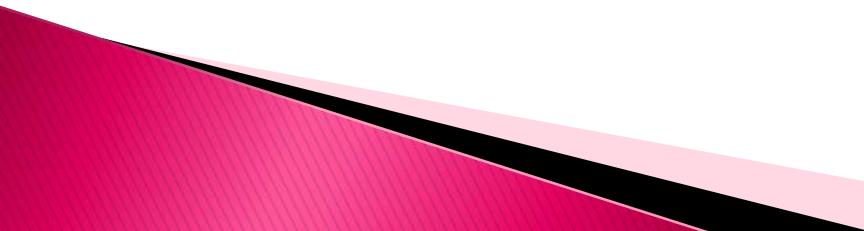
Lack of understanding of principles-based standards

- Report discusses attempts to reduce transaction costs of reform proposals

Commentary on submissions

- ▶ Twitter
- ▶ Blogs
- ▶ Tech journalists/radio
- ▶ Some financial press
- ▶ ‘author/creator/artist comments’
- ▶ A blog comment: ‘Here is a submission that's been dusted off from the 1996 pile. It's an exquisite example of early internet thinking. It toes a hard conservative line. The only thing good about it is its consistency. It bangs an old drum and keeps banging it remorselessly’.

Range of submissions

- ▶ Academics (individuals and groups)
 - ▶ Creators and organisations (authors, directors, photographers and others)
 - ▶ Education sector
 - ▶ GLAM (galleries, libraries, archives and museums)
 - ▶ Government authorities, (ACCC; ACMA; IP Australia; Standards Australia and others)
 - ▶ Media/broadcasting/other content organisations and industry bodies
 - ▶ Music organisations
 - ▶ On-line service providers
 - ▶ Publishers and publisher organisations
 - ▶ Rights management organisations
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Effect of reform

- ▶ Relevant change is necessary to deal with changes in technology, consumer demand, markets and the interests of Australians to access information.
 - ▶ Copyright also needs to have a degree of predictability so as to ensure sufficient certainty as to the existence of rights and the permissible use of copyright materials, leading to minimal transaction costs for owners of users and avoiding uncertainty and litigation.
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