



Australian
Institute of
Architects

Copyright and the Digital Economy

(Fair Use Exception)

Submission to

Australian
Law
Reform
Commission

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SUBMISSION BY

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PURPOSE

- This submission is made by the Australian Institute of Architects (the Institute) to the Australian Law Reform Commission in response to the invitation of submissions on *Copyright and the Digital Economy (Discussion Paper 79)*.
- At the time of this submission the Executive Committee of the Institute is: Paul Berkemeier (National President), David Karotkin (President-Elect), Shelley Penn (Immediate Past President), Jon Clements and Maggie Edmond.
- The Chief Executive Officer is David Parken.

INFORMATION

Who is making this submission?

- The Australian Institute of Architects (the Institute) is an independent voluntary subscription-based member organization with approximately 10,000 members, of which approximately 6,300 are architect members (registered or registrable under State and Territory Architects Acts).
- The Institute, incorporated in 1929, is one of the 96 member associations of the International Union of Architects (UIA).
- The Institute represents the largest group of non-engineer design professionals in Australia.



Copyright and the Digital Economy

Submission to Australian Law Reform Commission

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1.0 INTRODUCTION

1.1 Purpose of submission

- 1.1.1 The Institute is pleased to provide comment to the Australian Law Reform Commission on its Discussion Paper – Copyright and the Digital Economy.

1.2 Expertise of the Institute

- 1.2.1 The Institute seeks to advance the professional development of the architectural profession and highlight the positive benefits of good design in addressing the concerns of the community in relation to sustainability, quality of life and protection of the environment.
- 1.2.2 The Institute promotes responsible and environmentally sustainable design, and vigorously lobbies to maintain and improve the quality of design standards in cities, urban areas, commercial and residential buildings.
- 1.2.3 The Institute has established high professional standards. Members must undertake ongoing professional development, and are obliged to operate according to the Institute's Code of Professional Conduct. The Institute's Professional Development Unit offers an extensive program at national and state level, continuing to keep members informed of the latest ideas, technology and trends in architecture and the construction industry.
- 1.2.4 The Institute represents the profession on numerous national and state industry and government bodies, advising on issues of interest to the architectural profession, other building professionals and the construction industry.
- 1.2.5 Particular areas of expertise include:
- quality assurance and continuous improvement
 - industry indicators and outcomes
 - market analysis
 - risk management and insurance
 - marketing and communication
 - policy development and review
 - technical standards
 - environmental sustainability.

2.0 EXECUTIVE SUMMARY

- 2.1 The Institute recognizes the complexity of the question of keeping pace with technology. It also recognizes that the ALRC's proposal is not to replace all exceptions to copyright infringement, and some of those remaining are directly relevant to architects.
- 2.2 However, the Institute disagrees that a standards based legislative methodology to replace the exceptions named in the Discussion Paper is appropriate for the Copyright Act, and does not support introduction of a broadly based fair use exception based on that methodology.
- 2.3 The principle reasons for its view, are that standards based legislation depends on the long and continuous development of case law, which
- is by its very nature uncertain
 - displaces the certainty of exception based rules
 - displaces the opportunity for representative assessment of community needs and priorities through Parliamentary consideration in favour of the Courts hearing argument from interested parties according to the capacity of those interested parties to undertake the risks and cost of litigation
- 2.4 Most importantly, the position of many creators, including most architects, is not one of the economic strength to be an interested party able to undertake litigation.
- 2.5 The Discussion Paper has not satisfactorily reconciled the additional complication of moral rights in relation to its fair use exception.
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3.0 COMMENTARY

3.1 Preliminary

- 3.1.1 The essence of the Discussion Paper is a recommendation that a general ‘fair use’ exception is created to supersede the system of very specific exceptions to infringement of copyright, which some sectors of community argue has not kept up with technology development.
- 3.1.2 However, the Institute acknowledges that the Discussion Paper does not propose to replace the exceptions provided by s.68 and s.73 of the Copyright Act 1968 (“the Act”), which, in their application to buildings, are useful to the public, and also used by the Institute and its own members. Paraphrased, these sections provide that:
- a photograph of a building is not a breach of the copyright in the building (or the buildings in a streetscape)
 - reconstruction of a building is not a breach of the copyright in it, and that doing so using the copyright plans and other documents originally used with licence from the copyright holder, is not an infringement of copyright.
- 3.1.3 The Institute fully supports the retention of these exceptions. In fact, the exceptions are statutory defences to an allegation of infringement by a copyright holder, but in common usage constitute exceptions.
- 3.1.4 The ALRC’s proposal in the Discussion Paper is to replace the Act’s exceptions relating to research and study, reporting the news, etc., and private and domestic use, with a universal ‘fair use’ exception, framed as a “standard” to be analysed against a fairness test, and illustrative, but not binding, examples.
- 3.1.5 The Institute is very concerned by the concept of standards based exceptions, rather than legislated rules, in its implications for resource poor creators such as architects, and by the avenues for infringement, foreseen and unforeseen, that the new form of exception may bring.
- 3.1.6 Adoption of a broadly based ‘standard’, rather than specific rules, is either a blessing or a curse depending on your point of view, which in turn may be coloured by the strength of your economic resources, or the potential for you to make profit by a new interpretation around the standard.

3.2 Rules vs standards in relation to copyright

- 3.2.1 There is no doubt that the present Act is ultimately set up so that a copyright owner’s ultimate remedy for infringement is to litigate. However, this does not become necessary where there is a rule based exception applicable.
- 3.2.2 If you are a copyright owner, a rule based exception will concern you if it is too wide and allows infringement, but a tightly worded and relevant rule based exception gives certainty. As a copyright owner with a tightly worded rule, you can confidently assert your rights when the infringement does not fit within the exception, and the infringer knows, by the certainty a rule provides, they have nowhere to move. Hence this can avoid the need for the copyright holder to begin litigation. The significance of this for the majority of creators should not be underplayed – refer section 3.6, following.

- 3.2.3 Conversely, an ambiguous, out of step, or out of date rule based exception, in the face of real examples of infringement, probably provides no certainty until the Act is “fixed” to remove the problem. The problem is more likely to flow from new technology, or new services being made widely available. While the problem remains, this may result in hardship to either the copyright holder or the potential user of the material, depending on the circumstances. However, the salient point is that it can be addressed by legislative change, based on community consideration of the issues, to reinstate certainty.
- 3.2.4 On the other hand, if you are a potential “infringer” wanting to rely on an exception, you want flexibility to argue, particularly if there is substantial economic benefit at stake. Standards based exceptions inherently give you more flexibility to argue with unique facts, some of which you may have even set out to create.
- 3.2.5 As a copyright owner, a broadly worded standard will rarely give the certainty if a tightly worded rule, particularly if, as proposed, illustrative examples which are to be included in the amended Act, are merely that, illustrative, and by nature are not intended to determine for certain whether a factual circumstance example fits any particular standard.

3.3 Problems with applying a standards based test

- 3.3.1 A broadly based fair use exception based only on standards and testing of those standards also has, in our view, several significant problems in operation. Enforcement of the standard for determining whether an infringement falls under a fair use exception, relies on the application of a “fairness” test, again based on case law which must develop.
- 3.3.2 As it depends on case law, the only authority to rely on is precedent, requiring a person to be up to date with case law and the intricacies of it. Being familiar with case law relies on interpretive analysis, which itself can vary between even experts/lawyers in the field.
- 3.3.3 Introducing such a fair use test, which is broad and flexible, allows its application in ways unforeseen, to aspects and methods of infringing copyright that presently have no exception applicable as part of its rationale. There is no brake on this for the public benefit, short of catch-up legislation and the problems of retrospectivity, if this is necessary. The proposed fairness test does not include such a factor, nor should it, when it relies on the Courts.
- 3.3.4 The fairness factors to be considered, which are not proposed to be the only factors that a Court could consider, and is the following:
 - “(a) the purpose and character of the use;
 - (b) the nature of the copyright material used;
 - (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
 - (d) the effect of the use upon the potential market for, or value of, the copyright material.”

- 3.3.5 The Discussion Paper suggests the first test is the opportunity to determine whether the character (or purpose) is ‘commercial’. This is substantially the same as the USA law but it is not proposed that Australian implementation would mandate adoption of USA precedent. However, the Discussion Paper’s analysis seems to rely on USA case law without discussion of how, necessarily, any commercial use would be prevented from becoming a fair use exception in Australian law.
- 3.4 An example of applying a broad fair use exception to architects**
- 3.4.1 Nevertheless, if we assume that commercial use does not pass the first limb of the fairness test, the following example illustrates both the flexibility of a fair use exception, but also the consequence.
- 3.4.2 Here we consider the circumstance where a person tries to use for themselves, an architect’s plans, downloaded from a planning application advertised for statutory purposes on a local authority’s website.
- 3.4.3 (for the purpose of this example we leave out of consideration an extension of an implied licence to do so for the purpose of response to the planning application, or, use of a fair use exception for the person’s own research or study to respond to the planning application)
- 3.4.4 Ostensibly, while the person intending to build a house may not be outside a fair use exception in downloading it in an attempt to use a plan or part of it as an instruction to a builder, or another designer to incorporate it in a design, because that would not fall foul of the test for commercial use. The person has not themselves gained commercially from this action. (the builder or designer might well do so)
- 3.4.5 If the person’s attempt did not fail the first limb of the test, and neither the second or third, the fourth limb of the test would seem to bring such infringement by the person as outside the exception, because the effect of the use, in our view, is to diminish the market of the copyright holder, or at least the economic value of the original design.
- 3.4.6 While we can surmise that with a fair use exception the result above is probably what would happen, (after litigation), it remains arguable that the existence of the broad based fair use exception still brings a degree of uncertainty which is not present without it, because at present there is no exception at all which would allow a person to appropriate all or part of the design, for use in their own house.
- 3.4.7 In this example, the inflexible rule has not created a copyright “issue”, the existence of a broad fair use exception has.
- 3.4.8 It is also worth bearing in mind that the opportunity for the person to infringe in this way is not a result of new technology such as posting on the planning authority website – although it is arguably easier for a lay person to obtain the plans.

- 3.4.9 We point out that the fact that there is no exception here is not necessarily a failure of legislation to foresee infringement methods or opportunities or to keep up with technology. That there is no exception is also indicative of deliberate protection of copyright holder's rights. Further, the importance of licences and implied licences which place constraints on infringement to practical situations such as this, but at the same time permit what would otherwise be infringements, does not appear to have been considered in the Discussion Paper.

3.5 Moral rights, the unanswered questions

- 3.5.1 In the Institute's view, thorough consideration of the interplay of moral rights with the operation of a fair use exception is a significant gap in the Discussion Paper's analysis.
- 3.5.2 The interplay of the inserted moral rights provisions with copyright law as it exists is problematic in practice, partly, but also because the existing law is not fully reconciled and because the relationship is very much misunderstood in the community. This proposal of a fair use exception does purport to improve the reconciliation of moral rights with copyright law, but there are a number of potential effects of a significant change to copyright law as proposed in the Discussion Paper which should not be ignored.
- 3.5.2 First, there is potential for even greater confusion over the moral rights/copyright interplay with a fair use exception that is broadly based. In the simplest terms, will the fair use exception operate independently of moral rights?
- 3.5.3 If independent, then presumably an "infringer" operating under the exception would be free to use the copyrighted work, yet still be obliged to attribute the author(s). Would this operate as though the infringer had a licence to use the copyrighted work?
- 3.5.4 This might be appropriate, but where there is a licence, there is usually an opportunity to negotiate consent over attribution, including non-attribution. Operating under an exception means operating without a relationship to the author/copyright holder/licensee that enables negotiation.
- 3.5.5 If not independent, does this mean that whether or not the author is attributed is a factor to be considered in whether the use is fair? As others have questioned, where copyright ownership as an economic right is separate to the personal rights of moral rights, how would attribution as a personal right be reconciled as a fairness factor in a copyright economic rights exception?
- 3.5.6 Then there is the question of the integrity of the work to which moral rights are attached. How would a fair use exception that allowed, for example, partial use, be reconciled with the author's rights to have attribution removed, if they are not the copyright holder, and the infringer has argued for a fair use exception on the basis of attribution?
- 3.5.7 These are just some of the issues which need thorough analysis in considering whether a fair use exception is appropriate.

3.6 Public administration fair use as a burgeoning infringement

- 3.6.1 The Discussion Paper proposes including what are presently very constrained exceptions for government use as a broad “public administration” illustrative use under the fair use exception.
- 3.6.2 This is of concern to the Institute for its potential to become a “creeping” infringement of copyright by arms and levels of government on the basis of having the same rights as non-government users to claim fair use.
- 3.6.3 Necessarily, this means the weight of government resources to apply in arguing whether an infringement should be a fair use. For reasons outlined in the following section, this is of much concern to the Institute as it is where private organizations assert fair use.

3.7 The crucial factor, enforcement of rights by a resource poor creator

- 3.7.1 While under a broad fair use exception case law may eventually establish principles that protect the copyright holder’s economic rights, in general when a copyright holder attempts to assert its rights in the face of a new form of infringement, or method of infringement flowing from new technology, the holder may well be faced with a fair use argument.
- 3.7.2 In the absence of any case law or other commonly known precedent, (or rule based exception) the copyright holder has no real option but to decide whether to test the fair use exception in litigation.
- 3.7.3 This is the most significant real effect of a broadly based fair use exception, because it then becomes an opportunity for infringers, more powerful economically, so more capable of withstanding the cost of litigation, to bluff copyright holders.
- 3.7.4 Architects would rightly be concerned about the potential for the fair use exception to be asserted as bluff in negotiation, whether the infringer is their client, government client, or other body or third party.
- 3.7.5 The examples of other legislation quoted in the Discussion Paper to justify the adoption of standards based regulation, are to us, unconvincing. For example, under the *Competition and Consumer Act* there is a plethora of scenarios in which misleading and deceptive conduct can occur, making specific rules impracticable, but not at all matched by foreseen exceptions to copyright. The Discussion Paper also uses the example of the unfair contracts provisions included in the *Competition and Consumer Act*, (inclusions the Institute opposed because of the uncertainty in contractual relations they could cause) as a model for how standards based legislation works. However, in that legislation it is the proposer of the standard form contract which bears the onus of proof, not the consumer who enters into the contract. In other words, the (presumed) economically weak consumer is protected from the legal cost of having to assert rights. There is no such provision assumed in this proposal, almost as if there is an assumption that infringers are those without resources to defend themselves against copyright holders.
- 3.7.6 The Institute considers that if there is such an assumption it is misplaced. Copyright holders are in many cases the creators who are in the least position of economic strength. The make-up of the creative profession the Institute represents is very much one of small business entities with limited resources. Over 90% of the architectural practices in our purview are small to medium

enterprises, almost by definition without spare resources to pursue copyright claims of infringement in a situation where they would be expected to litigate without under ordinary circumstances of costs following the event. Rule based legislation as we have now, protects creators whose only realistic and practical means to protect their economic interests is to assert the provisions of the Copyright Act (where there is no exception).

- 3.7.7 If a broad fair use exception is introduced, in the Institute's view it might be effective in protecting the economic interests of the creator whose economic resources are weak, if:
- the illustrations are exhaustive enough to replace all the exception rules which the fair use regime replaces in the Act – this is fundamental.
 - if a 'formal demand' (according to the form established by the Act) is issued by the copyright owner to the infringer, the infringer must cease infringement immediately as an enforceable right.
 - An infringer, or potential infringer who wishes to test the illustration's reach, may bring an action while bearing the onus of proof to establish their case to either distinguish the illustration or illustrations as not applicable.
 - Full indemnity costs are available by presumption to the copyright owner or representative of a class of copyright owners who chooses to defend the action, whether or not the infringer meets the onus of proof, unless the Court's discretion in relation to the conduct of the copyright owner in litigation is applied to remove that presumption.
- 3.7.8 However, we recognise that the implementation of these 'constraints' on a broad fair use exception may well negate the apparent purpose of the broadly based exception, to introduce more flexibility than a rule based system.
- 3.7.9 However, in our view, the risks to copyright holders of a fair use exception outweigh the theoretical advantages of a standards based legislative system, which shifts the onus of regulating from Parliament to the Courts, where economic strength of litigants is unduly significant, and as a result the overall interests of the Australian community, including the economy, are at risk.

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