

FAIR USE AND OTHER COPYRIGHT EXCEPTIONS

**ISSUES PAPER RELEASED BY THE COMMONWEALTH ATTORNEY-
GENERAL'S DEPARTMENT IN MAY 2005**

**SUBMISSION BY THE DEPARTMENT OF
JUSTICE AND COMMUNITY SAFETY OF
THE AUSTRALIAN CAPITAL TERRITORY**

Issue: Should the Copyright Act be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?

Response: Yes. The Copyright Law Reform Committee (“CLRC”) has recommended the following:

- (a) a consolidation of all the fair dealing exceptions into 1 single provision;
- (b) expansion of the fair dealing to an open-ended model that refers to the current set or purposes (research or study, criticism or review, reporting news and provision of professional advice) but is not confined to those; and
- (c) the general application of the non-exclusive set of factors to all fair dealings (purpose and character of the dealing, nature of the work or adaptation, possibility of obtaining the work or adaptation within a reasonable time at a reasonable commercial price, the effect of the dealing upon the potential market for or value of the work or adaptation)

This model will deem a considerable amount of non-commercial use of copyright to be “fair”, resulting in greater equity in use of such material, but is limited by paragraphs (b) and (c) as the guidelines for determining “fair dealing” are tightly drawn.

Consideration should be given to providing guidance in the Act to courts to enable them to extend exceptions to newly developing circumstances.

Consideration should also be given to specifying the use of copyright material for the services of a government to be a fair dealing exception. This suggestion is based on the premise that a government does not generally make a commercial use of such material and that negotiating the rate of equitable remuneration payable by governments to collecting agencies and the terms of relevant agreements, from time to time, involve the use of considerable government resources which could be put to better use for the benefit of the community. Further resource commitments arise from the current requirement to have a survey of copying done for the service of a government.

Issue: Should the Copyright Act be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law?

Response: No. An open-ended fair use exception would, as noted in the issues paper (paragraph 7.12), result in there being “no clear-cut rules for distinguishing between infringement and a fair use” and the “only way to get a definitive answer on whether a particular use is a fair use is to have it resolved in a court.” This position would create ambiguity in relation to a particular use of copyright material and resolution by the courts would have significant resource implications. This would not be consistent with

the requirement stated in paragraph 4.7 that before any exception can be introduced or extended consideration must be given to whether the exception is clearly defined and narrow in scope and reach. The open-ended model recommended by the CLRC may not be regarded as narrow in scope and reach but is clearly defined and has the flexibility of not confining the purposes to only those specified in the legislation.

Issue: Should the Copyright Act be amended to include a specific exception for time-shifting television and radio broadcasts – including underlying works, films, sound recordings and live performances - and if so, under what conditions?

Response: It is not clear whether the model proposed by the CLRC would include this exception. If it does not include it, a specific exception for time shifting of television and radio broadcasts referred, as referred to in the issue, is appropriate. The features in the United Kingdom and New Zealand legislation, discussed in paragraph 11.4, would be useful to consider. It is also appropriate to consider making the time-shifting exception available also for copying for the services of a government, if the fair dealing exception proposed above for government copying does not cover it.

Issue: Should the Copyright Act be amended to include a specific exception for format-shifting, and if so, for what materials and under what conditions?

Response: It is not clear whether the model proposed by the CLRC would include this exception. If it does not include it, a specific exception for format shifting is appropriate. New Zealand proposals set out in paragraph 11.12 would seem to be a useful model. It is also appropriate to consider making the format-shifting exception available also for copying for the services of a government, if the fair dealing exception proposed above for government copying does not cover it.

Issue: Should the Copyright Act be amended to include a specific exception for making back-up copies of copyright material other than computer programs, and if so, for what materials and under what conditions?

Response: No comment.

Issue: Should the Copyright Act be amended to include any other new specific exception to copyright and, if so, under what conditions?

Response: No comment.

Issue: Should the Copyright Act be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances?

Response: No comment.

Issues paper: The Government seeks your view as to options for implementing reform, and the costs and benefits of those options.

Comment: The consolidation of the fair dealing exceptions in a single open-ended provision would appear to involve no more costs than those that currently apply in relation to fair dealing exception but would offer more benefits to copyright users. It would also give a measure of flexibility to courts (as referred to in paragraph 14.4) to decide whether uses other than the specified uses are fair. Specific exceptions of time-shifting and format-shifting, envisaged under option 3, could be added as exceptions to copyright infringements, if there is no scope for option 1 to cover them.