



AUSTRALIAN  
COPYRIGHT  
COUNCIL



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***Response to Issues Paper on Fair***

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**June 2005**

## Australian Copyright Council

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1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policy.
2. Some of the organisations affiliated with the Australian Copyright Council have made separate responses to the Issues Paper on Fair Use. The Australian Record Industry Association does not support the Copyright Council's position in relation to a private copying exemption tied to payment to copyright owners.

## Previous submissions on fair dealing and other exceptions

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3. We made a submission (in April 1997) to the Copyright Law Review Committee (CLRC) in response to its issues paper *Simplification of the Fair Dealing Provisions of the Copyright Act 1968*, released in connection with its inquiry into the simplification of the Copyright Act. We also made a submission in June 1997 on exceptions relating to libraries and archives, educational institutions, legal deposit, and people with a disability.
4. Following the release of the CLRC's report on the simplification of the Copyright Act, we made a submission (in March 1999) to the Federal Government responding to the report, including the recommendations about fair dealing.
5. We made submissions to the Federal Government and to the House of Representatives Standing Committee on Legal and Constitutional Affairs on the Digital Agenda Bill 1999 (in 1999 and 2000), and to Phillips Fox Solicitors and the Attorney-General's Department in relation to the Review of the Digital Agenda Act (in 2003 and 2004). The Digital Agenda Act introduced new exceptions into the Copyright Act, including exceptions allowing digitisation and use of digital material by educational institutions and libraries.
6. In 2004, we made submissions to the Joint Standing Committee on Treaties (JSCOT) and to the Senate Select Committee on the Australia-US Free Trade Agreement opposing the introduction of a fair use exception.
7. All these submission are available from our website.

## Summary of our position

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8. We oppose the introduction of an "open-ended" fair dealing provision, or similar provision. We think that the practical application of the fair use exemption in US law has been widely misunderstood in Australia, and, partly because of that, the introduction of an open-ended exception would create undesirable uncertainty in Australia. There appears to be a widespread assumption, for example, that a fair use exception would allow free private copying in a large range of circumstances.

9. Fair dealing in Australia, and fair use in the US, are intended to allow uses of copyright material for socially desirable purposes such as education and research and, in some cases, the production of new works which appropriately reference, or build upon, old works. We do not think private copying of music or film for convenience produces social benefits that justify a free exemption, and we do not think that such an exemption would meet the “three-step test” in the international treaties to which Australia is a party.
10. We are in favour of an exemption for private copying of audio and audiovisual material, in certain circumstances, provided copyright owners are remunerated for the copying. We note that many countries allow private copying, subject to remuneration to copyright owners. In most cases, this remuneration is generated by levies payable on copying equipment and/or media.
11. Educational institutions and libraries have much more extensive access to copyright material under Australian copyright law than they do under US law, particularly in relation to digital material. Compared to the US, the balance is already in their favour. Some of the current provisions relating to educational institutions and libraries could, however, be fine-tuned consistently with the three-step test. We understand that libraries and educational institutions will seek further exceptions in their responses to this inquiry. We will respond to those submissions when they are made available.
12. We are in favour of a mechanism allowing use of “orphaned” works, similar to that applying in Canada. The mechanism would need to involve a determination of whether the person wanting to use an orphaned work had taken all reasonable steps to identify and locate the copyright owner, and payment of a licence fee.

## **Background to this inquiry**

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13. This inquiry arose from recommendations by two Parliamentary Committees which conducted inquiries into the Australia–US Free Trade Agreement (AUSFTA): the Joint Standing Committee on Treaties and the Senate Select Committee on the Australia-US Free Trade Agreement. Some who made submissions to those enquiries argued that the AUSFTA would result in an unacceptable shift in the “balance” between copyright owners and users in Australia. They argued that the AUSFTA was intended to more closely align Australian copyright law with that of the US by “importing” certain provisions to benefit copyright owners, and that Australia should therefore “import” the US fair use provision to “complete the alignment”.
14. The Committees’ consideration of fair use was not anticipated by copyright owners, as the issue did not appear to be relevant to the AUSFTA. Partly for this reason, perhaps, the Committees appeared to be insufficiently aware of a number of factors relevant to their consideration of fair use. These include:
  - the US has a remuneration scheme for private copying of musical works on digital media, and many other countries have similar schemes;
  - it is not clear that “space-shifting” or “format-shifting” is fair use under US law;
  - educational institutions have greater access to material under Australian law than they do in the US, particularly for digital material, and this access applies to material covered by the extension of the copyright term;
  - libraries and other collecting institutions have greater access to material under Australian law than they do in the US, particularly for digital material,

and this access applies to material covered by the extension of the copyright term;

- while the AUSTFA may have resulted in some aspects of Australian copyright law becoming more similar to aspects of US law, there are still more differences than similarities in the two laws;
  - the cost estimates for term extension prepared for the Senate Committee by Dr Phillips Dee were based on an obviously flawed premise: that there is a constant flow of royalties throughout the period of copyright protection. Data collected by Copyright Agency Limited relating to educational use shows that 70% of works used are less than 10 years old, and that works which would currently be in the extended period (50 to 70 years after the author's death) make up only 0.02% of material copied.
15. Some, but not all, of these issues were addressed in the Issues Paper for this inquiry.

## **Response to issues in Issues Paper**

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### **Issue 1: Should the Copyright Act be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?**

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16. The CLRC's recommendation to "consolidate" the fair dealing exceptions was made in the context of "simplifying" the Copyright Act. The recommendation seems irrelevant out of that context. In addition, consolidation may give rise to unintentional changes to the substantive effect of the provisions.
17. We oppose the replacement of the current listed purposes (research or study; criticism or review; reporting news; professional advice) with "any purpose", or the addition of "any other purpose" to the current purposes.

### **Issue 2: 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?**

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18. We oppose the replacement of the present fair dealing exceptions with a model that resembles the fair use exception in US law. We think such a provision is not justified in Australia, would not comply with the three-step test, and would introduce undesirable uncertainty into Australian law.
19. The introduction of the fair use exemption in the US was intended to codify many years of preceding case law. The new statutory provision could be interpreted with reference to the preceding case law. We do not have such a body of preceding case law in Australia. Were an open-ended provision to be introduced into Australia it would be difficult, in the absence of Australian case law, to advise when the provision would or would not apply.
20. We understand that some people see a fair use exemption as a solution to a range of copyright issues they wish to have addressed. Some of these issues relate to "institutional" access (educational institutions, libraries, galleries and museums), some relate to personal use (private copying, in particular) and some relate to

other uses (new works based on old, for example). In our view, each of these issues must be addressed separately, assessed against the three-step test, and considered in the context of existing exceptions and statutory licences. While we can appreciate the initial attraction to users of a “one-stop fix” for a range of issues they want addressed, we think such a solution would be widely misunderstood and misapplied, and may not even apply in the way the proponents anticipate.

21. Libraries have asked for solution which will allow them to make a preservation copy of a rare published version of a work. The Copyright Act currently only allows preservation copies of manuscripts. In our response to the CLRC report on simplification of the Copyright Act, we proposed that the Copyright Act allow libraries to make preservation copies of rare editions of works. In our view, an issue such as this should be addressed by a specific exception applying only to libraries, not by a “catch-all” fair use provision.
22. We have not yet seen all the issues that others may want to be covered by a fair use exemption. We will respond to them when we have seen them.

**Issue 3: 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?**

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23. We support an exemption allowing the private copying of television programs subject to remuneration to copyright owners. The conditions of such an exemption would include:
  - the broadcast is non-infringing;
  - access to the broadcast has been authorised by the copyright owners;
  - the source copy is non-infringing;
  - the copy is made on private premises;
  - the copy is made for the private use of the person who makes it;
  - if the copy is subsequently used for any other purpose – including if it is lent or given away – it is deemed to be an infringing copy from time it was made;
  - relevant copyright owners receive remuneration for copies made in reliance on this exemption.
24. In countries whose copyright law allows private copying subject to remuneration, the remuneration is usually generated by a levy paid on copying equipment and/or copying media. There is further information in our discussion paper on this issue, available from our website at <http://www.copyright.org.au/research>. These levies have been successfully applied to digital media and devices in many countries.
25. Legislation requiring the payment of a royalty on blank audio tapes was introduced in Australia in 1989, but was subsequently held by the High Court to be unconstitutional because, in High Court’s view, it was a tax, and the Constitution requires taxation legislation to be introduced separately to other legislation. In the early 1990s, the Government considered introducing a tax on blank recording media to remunerate copyright owners. The proposal was not pursued, apparently because, around that time, the Government was considering allowing parallel importation of CDs, and the music industry’s resources were diverted to that issue.
26. Options for generating remuneration to copyright owners in Australia include a royalty on blank recording media and/or recording equipment – drafted to avoid

the constitutional problems of the 1989 legislation – and a tax on blank recording media and/or recording equipment.

**Issue 4: Should the Copyright Act be amended to include a specific exception for format-shifting, and if so, for what materials and under what conditions?**

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27. We support an exemption allowing the private copying of recorded music and audiovisual material subject to remuneration to copyright owners. The conditions of such an exemption would include:
- the source copy has been purchased by the person making the copy;
  - the source copy is non-infringing;
  - access to the source copy has been authorised by the copyright owners;
  - the copy is made on private premises;
  - the copy is made for the private use of the person who makes it;
  - if the copy is subsequently used for any other purpose – including if it is lent or given away – it is deemed to be an infringing copy from the time it is made; and
  - relevant copyright owners receive remuneration for copies made in reliance on this exemption.

**Issue 5: 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?**

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28. Individual consumers could make a back-up copy of recorded music and audiovisual material in certain circumstances under the remunerated private copying scheme we have proposed above in response to Issues 3 and 4.
29. We do not think there is a case for a free exemption allowing individual consumers to make a backup copy of, say, a video, for use if the video is damaged by the person's video player or dog or child. In addition, we think any such exemption would be misunderstood and misapplied. If the video is faulty, a consumer has remedies under consumer protection legislation.
30. Under the Copyright Act, a library is currently entitled to make a replacement copy of an item in its collection if it is unable to purchase a replacement copy. The provision appears to be based on an assumption that the library has a second copy from which it can make a replacement copy, or that another library holds a copy from which a replacement can be made. If this assumption is incorrect, and a licence to make a backup copy is not available within a reasonable time at an ordinary commercial price, then there may be a case for the making of backup copies by libraries under statutory licence, subject to payment of equitable remuneration.

**Issue 6: Should the Copyright Act be amended to include any other new specific exception to copyright and, if so, under what conditions?**

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31. We will respond to requests for further exceptions when we have had an opportunity to see those requests and the arguments for them.
32. There are exceptions which, in our view, should be repealed or amended. We have raised these in previous submissions provided to the Government, including the ones referred to at the beginning of this submission. There are two issues we will repeat here:
- The definition of “library” should be amended to exclude libraries in profit-making entities from the special exceptions applying to libraries; and
  - Sections 65 and 68, which allow the copying and publication of public art, should be repealed (as recommended in the Myer report on contemporary visual arts and craft).

**Issue 7: Should the Copyright Act be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances?**

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33. We have responded to this issue in our responses to Issues 3 and 4.

**Other issues**

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**Orphaned works**

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34. In previous submissions to the Government, we have proposed that there be a mechanism to allow use of material where the copyright owner cannot be found. There is a very limited mechanism of this type in section 52 of the Copyright Act, which allows publication of unpublished works kept in libraries.
35. The Canadian Copyright Act includes a mechanism which allows a person to make an application to the Canadian Copyright Board, and seek a licence from the Board for the use of the material in Canada. Provided the Copyright Board is satisfied the copyright owner cannot be found, it sets a licence fee, which is paid to the collecting society representing that class of works (with an undertaking from the collecting society to pay the copyright owner), or which the licensee undertakes to pay if the copyright owner emerges in the next 5 years.
36. We think that any mechanism allowing the use of “orphaned” works should require the payment of a licence fee, or there is a risk that users will choose to use “orphaned” works instead of works available for licence, and adversely affect the market for those works. The licence fee may vary depending on the type of use; a commercial use would likely require a higher use than a non-commercial one.

37. We understand that the procedure under the Canadian Act is reasonably informal, easy and cheap to use, that applicants do not need legal representation, and that one application may cover a number of works. Looking at the data on the Copyright Board's website, all except three of the applications to the Copyright Board have been successful. Of those three, two were refused because the copyright owner's permission was not needed (one case involved quotations of less than a substantial part, and one involved works in which the copyright had expired), and one was refused because the applicant had presented no evidence that the works had been published.
38. In Australia, the Copyright Tribunal may not be able to hear such applications because they would require a judicial determination (ie whether the applicant had taken sufficient steps to find the copyright owner), which may be outside the Tribunal's power. It may be, however, that such applications could be heard by the Federal Magistrate's Court, which can deal with cases in a speedy and inexpensive manner.

#### **Use of works in later works**

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39. Some people have argued for the introduction of fair use to allow "creative" use of works in later works, including for parody. In this regard, we think there is a distinction between the use of an earlier work in a later work in a way that comments upon the earlier work, and the use of an earlier work in a way that may enhance the later work, but says nothing about the earlier work. The former situation may warrant an exemption, but the latter does not.
40. The Copyright Act currently allows the use of works in later works for the purposes of criticism or review, an exception which has been recently considered in the *Panel* case. In addition, where part of a work is used in a later work, the purpose for which the part is used is relevant to determining whether or not the use is substantial. All uses of works in other works are, of course, subject to the moral rights provisions.
41. We are aware that there is a perception in some quarters that copyright is an unreasonable barrier to certain forms of artistic expression which "reference" other people's work. We think that that perception is unfounded in many cases, but we will respond to any examples given in submissions of artistic expression which may be unreasonably hampered by the requirement to get a copyright clearance.

Libby Baulch  
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