



Australian Libraries' Copyright Committee

Australian Digital Alliance

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FAIR DEALING AFTER THE FTA

On 2 March 2004, the Australian Libraries' Copyright Committee (ALCC) and the Australian Digital Alliance (ADA) released a joint Statement of Principles in relation to the implementation of the copyright provisions of the Australia - United States Free Trade Agreement the Australia (FTA). These principles were in furtherance of the broader principles of both organisations. They reflect our long standing view that the public interest is best served by copyright laws that balance strong protection against the need for fair access to knowledge and learning, freedom of speech and expression, and the free flow of information.

The FTA threatens to upset the fine balance of Australian copyright law. It has the effect of increasing the scope and strength of protection to reflect US copyright law, without the benefit of flexible fair use to maintain the copyright balance. This 'harmonisation' of Australia's copyright legislation with that of the United States is likely to have a significant negative impact unless balancing provisions are introduced.

This paper presents a proposal by the ADA and ALCC to introduce a flexible fair use style provision into Australian copyright law, so that it continues to strike a fair balance between the interests of owners and users of copyright material in these times of rapid technological change. The proposal will outline how we can achieve fair use style flexibility, without sacrificing the certainty of most aspects of our current fair dealing regime. Its objective is to provide a legal framework within which Australian citizens are not disadvantaged relative to US citizens in the context of the FTA

The Problem with Fair Dealing – Lack of Flexibility, Lack of Fairness

The main problem with Australia's current approach to fair dealing is the lack of fairness. By limiting the defence to a narrow, closed set of purposes, the question whether a particular dealing is fair is often never considered. The practical effect is that many things which might be considered fair use under US law, are currently clear infringements under Australian law. The contrast is illustrated by the common practice of taping a TV program at the time of broadcast so that it can be watched at a more convenient time. In the US, this "time shifting" of TV programs has long been considered fair use. In Australia, it is infringement. Unfair outcomes like this only serve to undermine respect for copyright law.

Other examples where a lack of flexibility may trigger infringement under current Australian law include "device shifting", "space shifting", parody, and dealings in "orphaned" works. The ADA and ALCC envisage that this proposal would legalise all of these uses. This could be made clear by exemplifying these uses in any accompanying explanatory memorandum to

the legislation. Alternatively, these uses could be included, by way of further example, in section 40(1) of the attached proposed legislation.

The Best Fix – Loosen the Rigid Purpose Test and Return the Focus to Fairness

The best solution to the current problems with fair dealing is not to extend the provision to one or two more specific extra purposes, adding further complexity to the Act. What's required is flexibility to adapt to changing technology, changing business practices and models, and new uses of copyright material. The only way to deliver this flexibility, is to loosen the purpose test to reflect the proven US fair use model.

As will be seen from our suggested changes (see Appendix), this can be achieved without sacrificing the certainty of the existing fair dealing provisions.

This approach has the added benefit of bringing Australian law into closer alignment with US law, further improving the level of harmonisation between the two regimes.

No Contracting Out

Reference is made to the recommendations of the Copyright Law Review Committee which resulted in the 'Copyright and Contract' Report in 2002.

In particular, the ALCC and ADA seek amendment of the current law to incorporate the principal recommendation of that report into the *Copyright Act 1968*. Thus, such an amendment should specify that the defence of fair dealing cannot be excluded or modified by agreement or contract, technological protections measures or electronic rights management information.

A failure to implement these changes will allow rights owners to use contracts and technology to override the balance struck under the act, thereby frustrating the policy objectives of the government.

Consistent with International Obligations

A common claim of rights owners is that any change in favour of users will place Australia in breach of its international obligations. In this scenario, any such claim is demonstrably without merit.

The 3-step test for permitted exceptions (from both TRIPS and the WIPO Copyright Treaty) provides that:

'Members shall confine limitations or exceptions to exclusive rights to *certain special cases* which do not conflict with a *normal exploitation* of the work and do *not unreasonably prejudice* the legitimate interests of rights holders.'

At the time of the WIPO Copyright Treaty, the agreed statement concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on 20 December 1996, confirmed

that exceptions currently provided for under existing laws were consistent with the 3 step test (including US style fair use) and could be appropriately extended into the digital environment.

For Australia to adopt a flexible fair use style defence is, therefore, entirely consistent with our obligations under applicable international treaties.

Appendix: Proposed Marked Up Changes to Implement Flexible Fair Dealing

40 Fair dealing

- (1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for purposes such as research, study, criticism, review or the reporting of news, does not constitute an infringement of the copyright in the work.
- (2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of reproducing the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation include:
 - (a) the purpose and character of the dealing;
 - (b) the nature of the work or adaptation;
 - (c) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
 - (d) in a case where part only of the work or adaptation is reproduced—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

40A Fair dealing for purpose of research or study

- ~~(1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or study does not constitute an infringement of the copyright in the work.~~
- (1A) A fair dealing with a literary work (other than lecture notes) does not constitute an infringement of the copyright in the work if it is for the purpose of, or associated with, an approved course of study or research by an enrolled external student of an educational institution.
 - (1B) In subsection (1A) the expression *lecture notes* means any literary work produced for the purpose of the course of study or research by a person lecturing or teaching in or in connection with the course of study or research.
 - ~~(2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of reproducing the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for the purpose of research or study include:
 - ~~(a) the purpose and character of the dealing;~~
 - ~~(b) the nature of the work or adaptation;~~~~

- ~~(c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;~~
 - ~~(d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and~~
 - ~~(e) in a case where part only of the work or adaptation is reproduced—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.~~
- (3) Notwithstanding subsection 40(2), a dealing with a literary, dramatic or musical work, or with an adaptation of such a work, being a dealing by way of the reproducing, for the purposes of research or study:
- (a) if the work or adaptation comprises an article in a periodical publication—of the whole or a part of that work or adaptation; or
 - (b) in any other case—of not more than a reasonable portion of the work or adaptation;
- shall be taken to be a fair dealing with that work or adaptation for the purpose of research or study.
- (4) Subsection 40A(3) does not apply to a dealing by way of reproducing the whole or a part of an article in a periodical publication if another article in that publication, being an article dealing with a different subject matter, is also reproduced.

41 Fair dealing for purpose of criticism or review

A dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of criticism or review, whether of that work or of another work, is not a fair dealing unless a sufficient acknowledgement of the work is made.

42 Fair dealing for purpose of reporting news

- (1) A dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical, is not a fair dealing unless a sufficient acknowledgement of the work is made.
- (2) The playing of a musical work in the course of reporting news by means of a communication or in a cinematograph film is not a fair dealing with the work for the purposes of this section if the playing of the work does not form part of the news being reported.

[Equivalent changes to ss 103A, 103B...]