

1. I write as someone who has dealt with administration of copyright for my late architect father Harry Seidler AC, photographers, visual artists and assisting with obtaining and securing clearances from artists and photographers for architecture exhibitions, a documentary, books (on architecture and a biography) and am aware of film/TV productions which film on location in my family childhood home and my office penthouse extension. I also have been a former copyright lawyer in the non-profit sector.
2. **this submission is to argue against fair use (section 5.2) and how it will undermine moral rights of creators, which in turn affects their reputation (and thus ability to get income).** Also the public interest for creators to control how their works are used.
3. the report claims at p121 that how people are using copyright material justifies the need for fair use. Much use of copyright material is mis-use. Just because users misuse material does not mean the copyright standards need to be lowered for all.
4. I know that for architects, photographers and visual artists – the moral right of being credited for their work, and that their work is not subject to derogatory treatment - is extremely important to them.

My late architect father liked how the French authorities insisted that the Australian Embassy in Paris had a plaque with the architects' names in 1977 – long before moral rights laws here. And he used to ask why French architects had their names next to postcards of buildings they designed (eg Henri Ciriani architect of World War 1 museum in France) but there was no equivalent law then in Australia for postcards of Australian buildings.

Also, one visual artist has sued my family when a fashion photographer had the artist's artwork as a backdrop – the case settled on eve of court – on condition that we as property owners ensured that the artwork not ever appear in any photo or film. Some 26 years later that artist will allow her artwork to appear in a film (excluding advertising) as long as her artwork is treated with respect and she is given a credit in the film. I state this to show how being credited is very important to creators. And fair use will lessen the community's understanding to respect creators rights.

5. **And if users are allowed to reproduce works “for fair use” then users will forget about the moral rights of attribution and upholding artistic integrity.**

Indeed at the Copyright Symposium in Sydney (organised by Australian Copyright Council) on 14 March 2014 – I asked Alan Kirkland CEO Choice (as part of a public symposium panel discussing “fair use”)– how he thought fair use would work with moral rights and he responded by

saying that it was important for owners of copyright to be paid. He had absolutely no idea about the moral rights provisions of the copyright act – and the concept of artists being credited and having their work respected. For someone at a copyright symposium to be so ignorant of the moral rights provisions of the copyright act shows how moral rights will be undermined and have not been considered by implementing fair use.

5.1 For instance, a composer usually does not compose a song for it to be used without permission in a home movie of a toddler doing antics – to then be posted on the internet. Such use can undermine the public's perceptions of how people remember the work – and music rights owners should have the right to remove such use in home movies which they find objectionable (as it is unlikely such use falls within a current fair dealing provision).

5.2 Likewise so-called 'transformative use' may undermine the original creator's intention of how they wanted their artwork or photo to be used. And it is unfair to have another usurp their creative endeavor without permission.

6. I have recently let a German book publisher publish photos in an architecture and design book. These photos were of architecture and had artworks hanging on the walls. I secured the copyright permission of most artists. But the German publisher (of a distinguished cultural institution) wanted for graphic design purposes to decolourise the colour photos – and they claimed that German law allowed them to decolorize colour photographs in "scientific publications". This was a book in architecture and design. I note this as an example of how an exception in one part of the law is used by users to ignore provisions in other parts of the law. I submit that if users have a blanket "fair use" – they will not even stop to consider moral rights, and usually it is only the copyright right which can be used an objective right to get the user to at least pay attention to the copyright owner's legitimate claims. It will be harder to pursue only a breach of moral rights, when the user will claim they have a right to use under "fair use".

7. All users tend to think their use is "fair". Since 1 July 1998, it is the photographer (not commissioning architect) who owns copyright in commissioned photos.

Eg Architectural magazines are so used to getting photos for free that they never want to have to pay to use a photo for an architectural project they ask to publish. I submit that fair use will make it even harder for photographers to be paid for their work.

8. Documentaries – there is a huge amount of time and effort to produce a documentary. There is currently an independent documentary being made on my late architect father Harry Seidler. I have seen the producers take much time to organize film crews, coordinate interviews, travel overseas, seek out images etc. A documentary's whole market is not only TV sales locally and in other countries but to market to educational institutions and libraries – and if users can in name of "fair use" just usurp all those efforts for "research" or "education"

or “non-profile exhibition” then it will lessen the chance of such documentaries being made.

Likewise I have seen the huge film crews (for TV and film) on set on location in my family home and office penthouse – huge amount of energy goes into making films and TV – and every user thinks using ‘Just a bit’ is must be fair. The current fair dealing provisions do enable legitimate specific uses and other use requires a licence.

9. the report claims p143 table 5.2 it is ok for someone to requite letters published in a biography. Often the person who has granted permission for the letters to be reproduced has done so for a limited print run and for a specific context of a biography. The owner of copyright in the letters (or say family photos) should not loose their rights to control how the letters are reproduced in a different context (outside of the limited fair dealing exceptions).
10. the report p143 table 5.2 that a teacher is prevented from scanning pages from textbooks to use in their lessons via an interactive whiteboard. I am sure a copyright agency licence is available for such use. But also for a teacher to be able to captialise on the efforts of a publisher to produce a good text book without payment will undermine the willingness of publishers to produce good text books.
11. Geo-blocking – this report forgets that copyright laws are country by country. Much of the pro-user group lobbying against geoblocking is to enable Australian viewers to download overseas TV programs before they are licensed to Australia (especially “game of thrones”. No person has a right to be entertained by any film. And it is completely undermining of the huge production costs to allow people to copy such films (with expensive location shoots in Spain and Yugoslavia) for free.

And whose interests are being served – those users with expensive broadband connections and expensive computers – who are recklessly indifferent to the rights of the creators to earn a living from their creative labours. The productivity commission should know better than to cater for greed at the expense of creators getting their return for their created product.

12. even non professional creators have concerns about “fair use” eg in the production of the DVD for the film “Rabbit Proof Fence” I assisted to contact those who wrote letters to the newspaper about the film for permission to reproduce their letters on a DVD extra for the film, and some letter authors (who were happy for their letter to appear in a newspaper) did not want their letter to appear in a DVD extra. The issue was not about remuneration, but not wanting to have their writing being used in a context they did not want. Fair use will make it harder for such authors to control how their words are reproduced.

13. In the US where fair use operates, there is a lack of certainty and so many cases have to be litigated. Part of any law is to be certain which our current fair dealing provisions allow.
14. Like in the US, if fair use is allowed, then archive managers will not even bother to consider copyright for any cultural or educational use. – but charge “access fees”. given my late father studied and worked in the US, I have dealt with two university archives, a state archive, and a federal cultural institution archive. None of them knew who the copyright owner is of the photos (and one audio interview) in their collection, yet they are adept at charging an “access fee” and assuming any use by the user is fair use – so they do not even consider the copyright owner’s rights. and I fear that if fair use is allowed in Australia, those institutions who hold archives will have strict and expensive access contracts for any user who wants to use photos in their collection. So like the US, if fair use comes in, the ability to monetize historic photos (still under copyright) is transferred from the copyright owner to the archive holder. This does not free up content but makes those organisations who have photography archives.

This report has preferenced the wants of users over the legitimate rights of creators and investors who made the copyright items. Fair use will also undermine an author’s right to be credited and have their work upheld with artistic integrity – as users will be so used to thinking of “fair use” that they (like CEO of Choice in March 2014) will not even consider moral rights.

Sincerely,  
Polly Seidler

3 june 2016