

Dr Paul Harpur
Senior Lecturer,
TC Beirne School of Law,
University of Queensland.

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Intellectual Property Arrangements

Productivity Commission

GPO Box 1428

Canberra City ACT 2601

RE: Submission

Introduction

Thank you for the opportunity to make a submission to the Productivity Commission Intellectual Property Arrangements Report. Copyright is a commercial interest that exists for the benefit of the community. This submission will argue that the United States fair use doctrine is an appropriate means of balancing the capacity of rightsholders to exploit their work for profits and the rights of people to use information for education, pleasure, work and in a range of other situations where it is deemed fair.

There will be submissions made that the United States fair use exemption would cause some economic harm or reduce creativity. These speculative arguments will not be considered in this submission simply because they ignore the fact that the United States has operated extremely

successfully with the fair use exemption. If failing to respect copyright was associated with economic disaster then China and India, who have far less robust copyright protections than Australia, should experienced decline.

Instead of dealing with spurious arguments this submission will analyse the fundamental purpose of copyright and explore how robust the information use restrictions remain under the United States fair use exemption.

Exceptions to Rightsholders' Exclusivity Provide Limited Relief from the Disabling Impact of Copyright

Copyright is about moderated exclusivity where fair use is appropriate

Copyright operates on the basis that it is in the public interest to restrict the free flow of information. There are however situations where the benefits in enabling access outweigh the public benefit in restricting access to works. Copyright accordingly grants a limited monopoly of

exploitation which is subject to reasonable and beneficial secondary uses.¹ The authorising of secondary uses, without rightsholders' permission, overrides the control that rightsholders seek.²

Copyright laws recognise that there are situations where it is fair not to restrict the use of information. The notion of fairness has been introduced into copyright regimes through the fair dealing and fair use doctrines. Both the fair dealing and fair use doctrines provide that information is not restricted from being used in circumstances that satisfy statutory tests of fairness. If one of these doctrines applies in a particular situation, then copyright laws do not restrict the use of information. Some jurisdictions, such as Australia, Canada and the United Kingdom, adopt fair dealing doctrines which specify a "range of specifically enumerated, statutorily permitted uses, such as research or news reporting".³ The United States, in contrast, has embraced the fair use doctrine which is not limited to particularised situations, but instead focuses on the fairness of a use.⁴ Within this wider application, the fair use doctrine is an open norm doctrine with a broad flexible application.⁵

The deference shown in copyright laws to the actual or potential commercial interests of the rightsholders substantially weakens the capacity of the fair dealing doctrine to achieve its potential of improving the sharing of information for educational purposes. Unlike Canada and the United Kingdom, the Australian Copyright Act 1968 (Cth) includes commercial availability as only one factor

¹ Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale Law Journal*, 283, 285.

² Johnathan Mukai, 'Joint Ventures and the Online Distribution of Digital Content' (2005) 20(1) *Berkeley Technology Law Journal*, 781, 783.

³ Richard Peltz, 'Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law' (2009) 17 *Texas Intellectual Property Law Journal*, 267, 274.

⁴ Michelle Connelly, 'The Role of the E-Book in the Library System: A Comparative Analysis of U.S. Fair Use and U.K. Fair Dealing in the E-Lending Universe' (2014) 22 *Cardozo Journal of International and Comparative Law* 561, 563.

⁵ Tyler G. Newby, 'Note: What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?' (1999) 51 *Stanford Law Review* 1633, 1642.

in determining whether a dealing can be regarded as fair. To determine whether the whole or a part of the work constitutes a fair dealing in Australia requires considering a range of factors including:

- (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.⁶

The United States fair use doctrine enhances market activity by reducing information monopolies which are essentially unfair. If a use satisfies the fair use doctrine, then copyright will not prevent that use from occurring. Section 107 of the *Copyright Act 1976* (USA) provides a non-exhaustive list of examples where the fair use doctrine might apply. These situations include “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”.⁷ Section 107 then explains that “the factors to be considered shall include—

⁶ *Copyright Act 1968* (Cth) s 40(2).

⁷ 17 U.S.C. § 107.

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.”

The fair use doctrine analysis involves an "equitable rule of reason," in which courts balance the interests of the rightsholders to an information monopoly, and the public in using information.⁸

⁸ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454-55 and n.40 (1984); Meghan McSkimming, 'Google Books and YouTube: Preserving Fair Use on the World's Leading Internet Video Community' (2012) 42 *Seton Hall Law Review* 1745, 1750-1751.