



Australian Government
Productivity Commission

Intellectual Property Arrangements

Roundtable on fair use

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Commissioners**



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About the inquiry

How did we go about this task?

- Asked by government to look at Australia's IP arrangements to ensure they encourage creativity and user access
- Sought evidence:
 - *Consultations and roundtables*
 - *Public submissions*
 - *Draft report for comment and feedback*

How did we go about this task?

- More consultations to come
 - *Submissions on draft report*
 - *Additional roundtables*
 - *Hearings*
 - *Final report to be delivered to government later this year*



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About today

Purpose of roundtable

- Discuss the draft recommendation on fair use
- Seek further evidence on the magnitude of costs and benefits
- Reduce any ambiguity to ensure final recommendation is clear and understandable
- Highlight any other ambiguities

Conduct of roundtable

- Discussions today will occur under 'Chatham House' rules
- We will provide a copy of this presentation and a list of roundtable attendees on our webpage shortly

Specific issues to cover today

- Certainty/uncertainty tradeoff
- Fairness factors
- Illustrative uses
 - *Fair use and statutory licensing*



Our draft fair use recommendation: what did we recommend and why?

What we consider current deficiencies in the system

- Exceptions an important part of getting the balance right
- Current exceptions are narrow and legalistic, rather than focused on the principle of fairness
- Past changes to exceptions have largely just 'caught up' with society
- Previous expansions of copyright not balanced by expansion of user rights

What did we recommend?

- Draft recommendation has several parts:
 - *Closed fair dealing exceptions replaced with open-ended fair use exception*
 - *Exception should include 'fairness factors' to guide user and judicial decisions*
 - *Non-exhaustive list of uses provide further guidance and certainty*
 - *An 'objects clause' and clear explanatory memorandum to provide further guidance*

Some key differences

Fair dealing

- Existing arrangements potentially more certain
- Responsibility for changing exceptions lies with elected representatives

Fair use

- Is general – can apply to any circumstance provided a use is fair
- Allows the law to adapt to new legitimate uses
- Can permit new uses that don't undermine economic incentive to create

Options for reducing uncertainty

- An objects clause in the Act to guide the application of the exception
- Guidance in the legislation similar to current research and study exception
- Guidelines developed by content creators and user groups
- Use of foreign jurisprudence

Questions for discussion

- Is fair use as uncertain as argued?
 - *Is fair dealing as certain as argued?*
- Can guidelines reduce uncertainty?
- Should guidance be embedded in legislation?

Our draft fairness factors

- *The effect of the use on the market for the copyright protected work at the time of the use*
- *The amount, substantiality or proportion of the work used, and the degree of transformation applied to the work*
- *The commercial availability of the work at the time of the infringement*
- *The purpose and character of the use, including whether the use is commercial or private use.*

Just a reminder.... the ALRC factors

- the purpose and character of the use
- the nature of the copyright material
- the amount and substantiality of the part used
- the effect of the use upon the potential market for, or value of, the copyright material

Why different factors to the ALRC?

- ALRC approached fair use from a legal perspective
 - *Build on Australian fair dealing*
 - *Minimise difference to fair use overseas*
- Our recommendation focusses on achieving an economic outcome
- Feedback in submissions suggesting overlap between the two approaches

Questions on fairness factors

- What is the likely impact of these factors?
- Are there meaningful differences between the PC and ALRC factors?
- Any potential unintended consequences from the factors?
- Can the fairness factors account for other issues, such as orphan works?

Non-exhaustive illustrative uses

- Fair use should have illustrative uses
 - *Act as guidance to users and the courts about the kinds of uses that should be considered fair*
- Drawn from the list proposed by the Australian Law Reform Commission
 - *Expanding on existing fair dealing and other exceptions*

Non-exhaustive illustrative uses

Fair dealing exceptions

- Research or study
- Criticism or review
- Parody or satire
- Reporting news
- Professional advice

Additional illustrative fair uses

- **Education**
- Access for people with disability

Picking up other existing exceptions

- Quotation
- Non-commercial private use
- Incidental or technical use
- Library or archive use

Fair use and statutory licensing

- Not all illustrative uses will be 'fair'
- Statutory licensing designed to reduce transaction costs for the government and education sectors
- Where a use is considered 'fair' it should be non-remunerable
 - *Statutory licences exist for all other uses*

Impact of fair use for education?

- Illustrative uses are just that – illustrative
- Educational institutions could potentially rely on fair use with or without it being an illustrative use
- Fairness factors designed to account for harm to creators, amount of copying and degree of transformation

Questions

- What role do illustrative uses play in fostering certainty?
 - *Are they necessary in an open ended exception regime?*
- Should other illustrative uses be included?

Further material on our website

- Copyright fact sheets and draft available on our website
- <http://www.pc.gov.au/inquiries/current/intellectual-property/>