**Mythbusting fair use**

**Australian Law Reform Commission Review – Copyright and the Digital Economy**

**Dispelling some myths about the ALRC’s fair use proposals**

The ALRC has proposed the introduction of a fair use provision to Australia’s copyright laws to make them work for the digital environment.

There have been many claims made about the negative effects of the introduction of a fair use provision in Australia. These claims are not supported by the facts.

**Myth 1 – the current system is working well. Or – if it ain’t broke don’t fix it**

Australia’s copyright laws are not working well in the digital environment. Many educational and other uses that are recognised as being fair overseas are not permitted in Australia. Australia’s copyright laws still do not permit basic internet functions such as search and indexing, common consumer activities such as backing up a CD or DVD collection onto a hard drive.

Australia’s laws are overly technical and do not adequately reflect modern teaching methods. For example, a teacher is currently allowed to write a poem on a blackboard for free. If she writes the same poem on a digital whiteboard instead, this activity must be paid for under a statutory licence. Imposing fees on basic educational uses of small amounts of digital materials creates disincentives for schools to use the most modern teaching methods for the benefit of Australian students.

**Myth 2 – fair use would harm Australian creators**

The ALRC has proposed a fair use assessment which specifically requires consideration of the impact of any educational use on copyright markets and the value of copyright works. If a use unreasonably harms copyright owners, it wouldn’t be considered fair, and licence fees would still be required.

It is surprising to see the reaction of copyright owners in Australia to the idea of fair use. This is in stark contrast to the United States, where the US Department of Commerce recently described fair use as “a fundamental linchpin of the U.S. copyright system”.[[1]](http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf)

**Myth 3 – fair use would mean that all educational uses of copyright materials would be free**

The Australian school sector clearly stated in submissions the ALRC that introducing a flexible exception would not mean that all educational uses of copyright materials would be free, and that many uses of educational materials would continue to be paid for under the statutory licensing arrangements.

These statements were endorsed by State, Territory and Commonwealth Education Ministers, as well as the Independent Schools Council of Australia and the National Catholic Education Office.

Statutory licensing arrangements would continue to operate under the ALRC’s proposals. Copyright owners would not be required to negotiate individually with schools, nor would each school need to obtain a separate licence for its copyright use.

**Myth 4 – fair use would take money away from Australian authors**

The ALRC has made it very clear that its proposals would not harm copyright owner markets. Indeed, the ALRC states very clearly that one of the factors that must be taken into account in any fair use assessment is the impact on copyright owner markets. A significant proportion of educational uses of copyright materials would continue to be paid for under the statutory licences.

Some activities that are identified as fair uses would no longer be remunerable, which may have some impact on licence fees. However any impact on licence fees would be confined to uses that do not significantly impact on copyright owners. The ALRC’s proposals would mean however, that Australian schools were no longer required to spend public funds on activities that do not affect copyright owner markets, such as:

* + printing out a fact sheet on head lice from the Department of Health and Ageing’s website to hand out to students
  + printing copies of a free tourism map from a website for students to use in class
  + asking a student to print a map from Google maps for a homework exercise

The ALRC’s proposals would simply ensure that educational licences fees were directed towards authors who are writing to earn a living.

**Myth 5 – fair use would damage the Australian publishing industry**

There is no evidence to suggest that fair use is damaging to a publisher’s bottom line; if anything, anecdotal evidence from the US and Australia indicates that publishing industries can and do thrive under a fair use system.

In the US, which has had fair use supported by voluntary licensing for many years, an authors’ group recently highlighted the growing opportunities for its members to create content for “a booming online education sector”.[[2]](http://www.asja.org/theword/2013/07/17/freelance-writing-meets-online-education-how-to-get-involved/#more-834.) The American Society of Journalists and Authors referred to “the incredible growth of online education”, and said that this represented “the largest financial opportunity for freelance writers in history”.[[3]](https://smartcopying.edu.au/mythbusting-fair-use/) In Australia, which does not currently have fair use, studies of author earnings have revealed low median incomes, with many authors being unable under the existing Australian system to meet minimum basic living costs with their creative income.[[4]](https://www.australiacouncil.gov.au/workspace/uploads/files/research/do_you_really_expect_to_get_pa-54325a3748d81.pdf) In the US, on the other hand, the book market expanded and book publishing revenues grew even during the recession.[[5]](http://www.techdirt.com/skyisrising/) Obviously the differences between the US and Australian publishing sectors cannot be attributed solely to copyright laws. The evidence does suggest however that it is perfectly possible for authors and publishers to thrive in a fair use environment.

**Myth 6 – fair use would make life harder for Australian teachers**

The ALRC’s proposals would not make life harder for Australian teachers. The current Act has different copyright rules for different types of copyright content, and different technologies. For example, different rules apply to novels v short story collections, artworks v illustrations, CDs and MP3s, books and newspapers. There are also different rules depending on whether the teacher uses a photocopier or a learning management system.

Under fair use, schools with the assistance of expert advisors would develop clear and simple ‘fair use guidelines’ for use by teachers. These guidelines would apply irrespective of the type of content or teaching method being used. This would make it easier – not harder – to use emerging technologies in classrooms. Schools already have guidelines in relation to applying 200AB which are regularly applied.

**Myth 7 – Australian schools only spend $17 per year on copyright content for students**

The Australian schools sector currently spends upwards of $665 million dollars per annum on purchasing educational resources for Australian schools. This expenditure is in addition to the over $80 million dollars that schools pay to copyright collecting societies each year.

There is no suggestion the ALRC’s proposals would impact in any way on the amount that Australian schools spend on purchasing educational resources. Statutory licences with Copyright Agency and Screenrights would continue to exist. Public education funds would be directed towards payments to authors who write to earn a living, and would no longer be spent on educational uses such as displaying material on screen in a classroom, or printing a page of a free online colouring sheet from a web page for use in a kindergarten class.

**Myth 8 – fair use is a foreign concept. It can’t work in Australia**

This is simply not correct. Australia’s fair dealing provisions and the United States fair use provision share a common legal history. Flexible copyright provisions similar to those proposed by the ALRC also work well in countries such as Canada, Israel, Singapore, South Korea and India.

**Myth 9 – the ALRC’s proposals are radical and ill-considered**

Australia has been thinking about introducing fair use for a long time. A flexible copyright exception very similar to the ALRC’s proposal was first recommended for introduction in Australia in 1998.[[6]](https://trove.nla.gov.au/work/9110700/version/45814069) The introduction of fair use was recommended by Parliamentary Committees in 2004.[[7]](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=freetrade_ctte/report/final/ch03.htm) The House of Representatives Inquiry into IT Pricing recently recommended the consideration of fair use for consumers, businesses and educational institutions.[[8]](https://smartcopying.edu.au/mythbusting-fair-use/)

**Myth 10 – fair use is too uncertain**

Fair use jurisprudence in the United States is reasonably coherent and predictable. Guidelines and best practice statements have been developed to provide additional certainty as to how fair use works. Documentary filmmakers – who previously found it difficult to get insurance – are now finding that the major US insurance companies will insure their projects if they can show that they’ve applied the fair use guidelines that were developed for their particular community.[[9]](http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use)

Fair use may actually be more certain than Australia’s current laws.

For some current exceptions, courts have had to focus on technical details such as who technically made the copy, instead of on whether making the copy was fair. For the fair dealing exceptions, Australian courts currently have to ask two questions: (1) was the use for one of the purposes set out in the Act?; and (2) was the use fair? In has proved to be quite difficult in practice to predict how courts will answer this first question, and this has created a fair amount of uncertainty. Under fair use, a court simply has to ask ‘was the use fair?’, taking into account the fairness factors that are set out in the Act. A fair use assessment based on the clear fairness criteria proposed by the ALRC may in fact be much more predictable than the current law.

**More information**

You can also contact the National Copyright Unit on (02) 7814 3855 or email at [delia.browne@det.nsw.edu.au](mailto:delia.browne@det.nsw.edu.au) .

The National Copyright Unit provides – and will continue to provide – clear and straightforward guidance to teachers about how copyright materials can be used in Australia’s classrooms.

[1] The Department of Commerce Internet Policy Task Force, Copyright Policy, Creativity, And Innovation in the Digital Economy (July 2013), available at:  <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>.

[2] Laura Town, Freelance Writing Meets Online Education: How to get Involved (July 17 2013), available at:  <http://www.asja.org/theword/2013/07/17/freelance-writing-meets-online-education-how-to-get-involved/#more-834>.

[3] Ibid.

[4] David Throsby and Anita Zednik, Do you really expect to get paid? (10 August 2010), available at: <https://www.australiacouncil.gov.au/workspace/uploads/files/research/do_you_really_expect_to_get_pa-54325a3748d81.pdf> .

[5] Michael Masnick and Michael Ho, The Sky is Rising! (January 2012), available at:  
<http://www.techdirt.com/skyisrising/>.

[6] CLRC, Simplification Report [2.03], available here: <https://trove.nla.gov.au/work/9110700/version/45814069>.

[7] The Joint Standing Committee on Treaties—Parliament of Australia, Report 61: The Australia-United States Free Trade Agreement (2004), Rec 17; Senate Committee considering the Australia –United States Free Trade Agreement in Chapter 3 – Intellectual Property at [3.103 – 3.105], available here:  <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=freetrade_ctte/report/final/ch03.htm> Parliament of Australia, Senate Select Committee on the Free Trade Agreement between Australia and the United States, Final Report, August 2004. See in particular Labor Senators recommendation 8;Cited at footnote 5 in Weatherall, K, Of copyright bureaucracies and incoherence: Stepping back from Australia’s recent copyright reforms, Melbourne University Law Review, Vol 312007,  p976.  See also Regulatory Impact Statement to Copyright Amendment Bill 2006, p6.

[8] House of Representatives Standing Committee on Infrastructure and Communications, At What Cost? IT Pricing and the Australia tax (Canberra, July 2013) at xiii.

[9] The Documentary Filmmakers’ Statement of Best Practices in Fair Use is available here:  <http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use> .