



FEBRUARY 2014

# ALRC RECOMMENDATIONS COPYRIGHT UPDATE

AUSTRALIAN LAW REFORM COMMISSION RECOMMENDS COPYRIGHT REVOLUTION.

**THE AUSTRALIAN LAW REFORM COMMISSION'S FINAL REPORT ON ITS REVIEW OF THE COPYRIGHT ACT RECOMMENDS CHANGES THAT, IF ADOPTED BY THE GOVERNMENT, WOULD REVOLUTIONISE AUSTRALIAN COPYRIGHT LAW.**

The final report prepared by the Australian Law Reform Commission (ALRC) on its review of the Copyright Act (Act) recommends changes that, if adopted by the Government, would revolutionise Australian copyright law.

The ALRC report was made public on 13 February 2014, when it was tabled in Parliament. The report recommended major changes to the Act, including:

- replacing "fair dealing" with a "fair use" exception to copyright infringement;
- if fair use is not introduced, consolidating the existing "fair dealing" exceptions; and
- more stringent limits on the extent to which parties may contract out of exceptions to copyright infringement.

The introduction of a fair use exception would completely transform Australian copyright law,

bringing it into line with the laws in other more technology-focussed countries.

## Fair use to replace fair dealing

The current exceptions to copyright infringement largely focus on a concept of "fair dealing" with copyright material. However, the exceptions only apply if use of the material is a fair dealing for one of the following purposes:

- research or study;
- criticism or review;
- parody or satire;
- reporting news; or
- professional advice.

The ALRC's proposed fair use exception would be more flexible than the current fair dealing exceptions, and would not require the underlying

purpose of the use to fall into one of the above categories. Essentially, the fair use exception would require a consideration of the question: is this particular use of copyright material "fair"? A fair use of copyright material would not infringe copyright.

In deciding whether a particular use of copyright material is fair, a court would be required to consider a number of "fairness factors", including the:

- purpose and character of the use (including whether it is a "transformative use");
- nature of the copyright material;
- amount and substantiality of the part used; and
- effect of the use upon the potential market for, or value of, the copyright material.

The structure of the ALRC's proposed exception also includes a list of non-exhaustive "illustrative purposes", which are intended to guide courts when deciding whether a use is fair. If a use fits into one of the illustrative purposes, that will not create a presumption that the use is fair; however, it will "tend to favour a finding of fair use". In addition to the five purposes under the current fair dealing exceptions, the illustrative purposes include:

- quotation;
- non-commercial private use;
- incidental or technical use;
- library or archive use;
- education; and
- access for people with disability.

Despite negative submissions from rights holders, the ALRC considered there to be many advantages to introducing fair use:

- it is flexible and technology neutral, allowing Australia's copyright law to quickly adapt as copyright material is used in new ways;
- it promotes the public interest, particularly by allowing educational institutions to make better use of copyright material;
- it may actually assist innovation by removing regulatory barriers for technology innovators and investors, thereby encouraging technological development in Australia;

- it is better aligned with consumer expectations - consumers would be able to use copyright material in harmless ways that do not damage rights holders' markets (for example, by posting a photo of a book with an artwork on the cover on eBay or Gumtree).

If the Government adopts the ALRC's recommendation regarding fair use, it will be up to the courts to strike a fair balance between rights holders' interests and the public interest in using copyright material. The ALRC's argument that Australia should adopt a more adaptable stance on copyright infringement as we move further into the digital age is compelling.

### Fair dealing - the fall back position

The ALRC noted that rights holders were opposed to the introduction of a fair use exception, and as a result of that opposition, proposed an alternative, "second best" option: a new, consolidated fair dealing exception. Where the preferred fair use exception would be flexible, the new fair dealing exception would be confined to a set of prescribed purposes (which would be the same as the illustrative purposes recommended for the fair use exception). A court considering whether a use of copyright material falls under the fair dealing exception would have to consider two questions: (1) is this use for one of the prescribed purposes? (2) if so, is it fair (considering the fairness factors)?

While the ALRC's fair dealing proposal would go some way to making the Act more flexible and technologically adaptive, it does not go as far as fair use. Under fair dealing, a use of copyright material that might otherwise be fair under a fair use exception will be unfair if it does not fall under one of the prescribed purposes. However, many stakeholders submitted that a fair dealing exception with prescribed purposes was more certain than a fair use exception, thereby gives rights holders more confidence and a greater incentive to create.

### Contracting out

The Act does not currently prevent parties from excluding or limiting the operation of the exceptions to copyright infringement, except in relation to certain uses of computer programs. In its review, the ALRC considered whether parties to contracts should be permitted to contract out of a larger number of exceptions, including its proposed fair use exception.

The ALRC ultimately concluded that the Act should not put statutory limitations on parties' ability to contract out of the proposed fair use exception. Because of the broad application of the proposed fair use exception, putting limitations on the enforceability of contract out provisions would potentially have unintended consequences for businesses involved in the distribution of copyright materials. In addition, the flexibility of the fair use exception may be hindered. However, the ALRC anticipated that the contractual background involved in a copyright infringement dispute could be considered as part of the proposed fair use exception.

If the Government does not adopt fair use, the ALRC recommended that contracting out be unenforceable in relation to all of its proposed fair dealing purposes. The ALRC acknowledged that this recommendation is partially designed to protect the important public interests that some of these purposes recognise (for example, research and study or criticism and review) and partially a pragmatic necessity, removing the need to distinguish between different purposes under the fair dealing exception. The ALRC also commented that the recommendation attempted to strike a balancing of interests - if users of copyright material are confined to prescribed purposes for uses to be considered fair dealing, then these rights should be protected from contracting out.

### Other recommendations

The ALRC makes several other recommendations:

- retaining and reforming some existing specific exceptions to copyright infringement, and introducing new specific exceptions (including a public interest exception and a libraries and archives exception);
- reform of the statutory licensing schemes for education and the Crown, to streamline the licences and make them less rigid and prescriptive;
- limitation of remedies available for copyright infringement in situations where a reasonably diligent search for the rights holder has been made and, where possible, the work has been attributed to the author (to promote wider use of orphan works); and
- reforming the broadcasting exceptions.

### What's going to happen next? Some reactions

Many rights holders have expressed concern that a broad fair use exception will weaken the incentive to create. For example, the Australian Copyright Council has criticised the ALRC's recommendation, arguing that the proposed exception "could stifle rather than promote innovative business models and have a negative effect on the livelihoods of creators and the ability of consumers to access content". Screenrights described the ALRC's proposal as "a chaotic reconstruction of Australian copyright law" that "ignores all the evidence that the current system is working well".

There is no set time frame in which the Government is required to respond to the ALRC's report, and some reports are implemented several years after they have been completed. Early indications from Attorney-General George Brandis suggest that he is ambivalent towards the ALRC's proposed fair use exception, with Senator Brandis commenting that he "remains to be persuaded" on fair use, but will bring an open mind to the debate. However, Senator Brandis has acknowledged the need to reform Australian copyright law, recently describing the Act as "overly long, unnecessarily complex, often comically out-dated and all too often, in its administration, pointlessly bureaucratic".

## MORE INFORMATION

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