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### **Fair Use and Other Copyright Exceptions**

Dear Ms Daniels

Electronic Frontiers Australia Inc is a non-profit national organisation concerned with the protection and promotion of the civil liberties of users of computer based communications systems and of those affected by their use.

Below is our submission in response to the Attorney-General's examination of fair use, fair dealing and other copyright exceptions.

We thank you for the opportunity to take part in this review.

Yours sincerely

The Board of Management of  
Electronic Frontiers Australia Inc.

**Electronic Frontiers Australia Inc.**  
**submission to the Australian Attorney-General**  
**regarding**  
**Fair Use and Other Copyright Exceptions**

## Executive Summary

Electronic Frontiers Australia makes the following recommendations:

1. The *Copyright Act 1968* should be amended to implement an open-ended fair dealing exception to copyright infringement based closely on the US fair use exception.
2. The *Copyright Act 1968* should be amended to implement specific exceptions for *time-shifting*, *format-shifting* and *making a backup copy* with the only condition that such copying not be for resale or distribution.
3. There should not be any "private copying" statutory licence or royalty.

These recommendations are based on the following key justifications:

- The existing fair dealing exceptions are unduly narrow in scope and have been interpreted and applied in unduly restrictive ways.
- Australian consumers have a widespread and legitimate belief that copying for purposes such as *time-shifting*, *format-shifting* and *making backup copies* should be permitted by law.
- An open-ended fair dealing exception and the specific exceptions discussed are a necessary part of ensuring proper balance in copyright law and do not require that copyright holders be compensated.

## About EFA

Electronic Frontiers Australia Inc (EFA) is a non-profit national organisation concerned with the protection and promotion of the civil liberties of users of computer based communications systems and of those affected by their use. EFA was established in 1994, is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties.

Intellectual property issues have increasingly become the concern of computer and Internet users, and developers of related technologies. EFA members and supporters come from all parts of Australia and from diverse backgrounds. They have a common interest in ensuring that copyright law, particularly as it applies in the digital environment, provides an appropriate balance between ensuring protection for copyright developers and freedom for copyright users and other developers.

## Introduction

EFA believes that copyright law is and should be for the purpose of promoting creativity, innovation and development. The traditional means for achieving that end has been the granting of economic incentives through copyright ownership. It should be borne in mind that the "making and enforcement of law are not ends in themselves"<sup>1</sup> and that rights granted under copyright law should be treated as *means* and not as *ends*.

There is no doubt that sometimes copyright can have the effect of stifling rather than promoting creativity and of excessively regulating normal consumer behaviour. As such, copyright law has long recognised a range of exceptions to the enforcement of these rights. Unfortunately, Australian copyright law has long failed to recognise exceptions designed to bring balance to the law with the result that "the present position is lamentable".<sup>2</sup>

In the United States, fair use plays a key role in copyright law. The US copyright law embodies a "copyright bargain" that balances divergent public policy interests: First, the promotion of learning and the progress of society through the generation of ideas and information; second, providing an economic incentive to authors and performers to produce works; third, the protection of the public interest in the free flow of information and ideas that benefit society. US copyright law does this by providing a structure that ensures public access to created works both during the term of copyright (fair use and other limitations) and after the statutory monopoly has ended, when works go into the public domain (a Constitutional requirement that copyright be for a limited term).

The first and third of these policies represent the public's side of the copyright bargain. In exchange for granting a statutory monopoly limited in time and scope, users of information should be able to access and freely discuss ideas embodied in copyright works. Fair use is the mechanism that has been used by US courts since 1841 to balance these competing policy priorities and take account of the public interest in copyright works. Fair use thus acts as a limitation on the exclusive rights of copyright owners. It describes a set of permitted uses between the rights granted to authors and creators, and the rights reserved to the public.

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<sup>1</sup> Mason P, speaking extra-judicially at the 3rd Annual Conference of the Association for Compliance Professionals of Australia Inc, 23 September 1999: <[http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/sp\\_230999](http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/sp_230999)>.

<sup>2</sup> *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013, 1060.

## The current fair dealing exceptions

**Issue 1:** The Government seeks your view on the operation of the exceptions in the Copyright Act (particularly the fair dealing exceptions in ss 40-43(2) and ss 103A-103C) in providing a balance between the interests of copyright owners and copyright users.

While the existing exceptions in the *Copyright Act 1968* (the Act), including the fair dealing exceptions, go some way towards striking a balance between the interests of copyright holders and *certain groups* of copyright users, EFA does not believe these exceptions strike an acceptable balance between copyright holders and consumers of copyright material generally.

EFA has a number of general concerns relating to the existing exceptions, including that:

1. The existing fair dealing exceptions apply only where the dealing is done for one of the four specified "permitted purposes" (research or study, criticism or review, news reporting, and giving professional advice)<sup>3</sup> and fail to protect the interests of most Australians who deal with copyright material in their day to day lives.
2. The existing fair dealing exceptions have been applied and interpreted in unduly narrow and restrictive ways.<sup>4</sup>
3. Most other exceptions benefit only specific groups of users, such as libraries, archives, educational institutions, and broadcasters.
4. The existing exceptions completely fail to protect the legitimate interests of ordinary Australian consumers to make minor, non-commercial dealings with legitimately acquired copyright material.<sup>5</sup>
5. The overall balance between the rights of copyright holders and copyright users has been disturbed, and tilted strongly in favour of copyright holders by the Australia-United States Free Trade Agreement (AUSFTA).

This balance has been further upset by amendments to the exceptions made by the *Copyright Legislation Amendment Act 2004* (Cth) (the CLAA Act). This Act was introduced to address last-minute objections of the United States of America to the AUSFTA implementation legislation. The effect of these amendments was not given proper consideration, the Act was rushed through parliament, and no meaningful consultation with stakeholders was undertaken.

EFA additionally has a number of concerns relating to specific exceptions, including the following:

### **s 111 – Filming or recording broadcasts for private and domestic use**

While this section may appear to authorise "private and domestic use" copying of TV broadcasts, as acknowledged in the issues paper,<sup>6</sup> it does not in fact do so. EFA believes that s 111 merely contributes towards the complexity of, and misunderstandings about Australian copyright law.

<sup>3</sup> *Copyright Act 1968* (Cth), ss 40-43, 103A-103C.

<sup>4</sup> See: *TCN Channel Nine v Network Ten* [2002] FCAFC 146; (2002) 118 FCR 417 and M Handler & D Rolph "A real pea souper": the Panel Case and the development of the fair dealing defences to copyright infringement in Australia" (2003) 27(2) *Melbourne University Law Review* 381.

<sup>5</sup> Such as time-shifting and format-shifting.

<sup>6</sup> At page 45.

### **ss 43A, 111A – "in the course of communication" exceptions**

These exceptions are flawed, because they each specifically provide that they do not apply to the making of temporary copies in the course of communication, if the making of the communication is an infringement of copyright.<sup>7</sup>

One example of the effect of this condition is that if an Internet user visits a website, which, even if unknown to them, contains material which infringes copyright, any copies incidentally made by the user's computer in the act of viewing that website will also be infringing copies, rendering the user liable to legal action.

### **ss 43B, 111B – "technical process of use" exceptions**

These exceptions are also flawed for several reasons, including similar reasons as set out above for ss 43A and 111A.

These exceptions only apply where temporary copies are incidentally made as a necessary part of a technical process of using a copy of the material.<sup>8</sup> They would not apply where the making of the incidental copy is desirable for reasons of speed, efficiency, cost savings, etc, but the copying is not strictly speaking "necessary". This may act as an obstacle to the efficient design and development of new technologies.

Further, these exceptions do not apply where temporary copies are incidentally made from an infringing copy of the material.<sup>9</sup> This seemingly insignificant provision has far-reaching consequences, and has stretched the application of Australian copyright law from applying to the copying of material, to applying to the use of copyright material, and in a digital environment, making each and every use of an infringing copy a separate act of infringement.

### **s 47B – "normal use or study of computer programs" exception**

The exception contained in s 47B(1) of the Act is of little benefit, as it does not apply to incidental copies made from an infringing copy<sup>10</sup> (with the effect of extending copyright law to the usage of copyright material, as previously discussed), and it allows for software vendors to "opt-out" of allowing this exception, via a provision in a software licence or otherwise.<sup>11</sup>

The exception contained in s 47B(3) may be of some use to software developers, but the studying or copying of "the ideas behind the program and the way in which it functions" is fraught with other legal problems, especially with regard to so-called "software patents".

### **s 47C – "backup copy of computer programs" exception**

This exception is of little benefit as it does not permit making backup copies of computer software which is protected by Digital Rights Management or other "copy protection" methods which would require modifying the program to make copies of it.<sup>12</sup>

Further, similar to the concerns about s 111, s 47C does not apply in relation to works or other subject matter except a "literary work that is a computer program". Many computer programs will

<sup>7</sup> *Copyright Act 1968* (Cth), ss 43A(2), 111A(2).

<sup>8</sup> *Copyright Act 1968* (Cth), ss 43B(1), 111B(1).

<sup>9</sup> *Copyright Act 1968* (Cth), ss 43B(2)(a)(i), 111B(2)(a)(i).

<sup>10</sup> *Copyright Act 1968* (Cth), s 47B(2)(a).

<sup>11</sup> *Copyright Act 1968* (Cth), s 47B(2)(b).

<sup>12</sup> *Copyright Act 1968* (Cth), s 47C(4)(b).

have accompanying or underlying works or other subject matter which are necessarily copied with the computer program with the effect that these programs cannot be backed up without infringing copyright.

### **Computer program exceptions generally**

EFA has concerns about the applicability and real-world utility of many of the other exceptions to copyright contained in Part III, Division 4A of the Act.

### **Fair dealing exceptions generally**

In EFA's opinion, the fair dealing exceptions have failed to provide appropriate balance between the interests of copyright holders and copyright users.

One of the most obvious failings is the illegality of "time shifting" and "format shifting" in Australia.

As acknowledged by the issues paper,<sup>13</sup> it is currently illegal in Australia to copy music from a legitimately purchased Compact Disc (CD) onto an MP3 player, or an Apple iPod, or indeed to copy music onto any device in any format. Likewise, it is illegal to record a television broadcast (whether using a Video Cassette Recorder, or newer technology such as DVD recorders or TiVo type devices) to view at a later time.

These restrictions are contrary to the reasonable expectations of Australian consumers. Indeed, we believe that the vast majority of Australians are unaware that these uses of copyright material are illegal.

Australians have a legitimate interest in being able to time-shift and format-shift legitimately obtained copyright material, and the exceptions currently provided do not protect this interest.

## **The CLRC proposal**

**Issue 2:** The Government seeks your view on whether the Copyright Act should be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?

EFA considers that the changes recommended by the CLRC would be an improvement upon the current situation, but we hold some concerns about the CLRC proposal, and we do not believe it would be the best solution. The test of "fairness" under the CLRC proposal would be the fairness test that is currently contained in s 40(2) of the Act. While that fairness test is in many ways similar to the fairness test under US law, it is not identical, and differs in one very important aspect.

Section 40(2)(c) includes the test of "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price". This test is not contained in the US fairness test, and has the potential to significantly affect any judicial decisions on the fairness of a particular usage. For example, if copies of a television series can be purchased on DVD "within a reasonable time at an ordinary commercial price", would this then mean that it would not be "fair" to record a

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<sup>13</sup> Paragraph 4 of the foreword, page 2.

television broadcast of that show for later viewing?

## An open-ended fair use exception

**Issue 3:** The Government seeks your view on whether the Copyright Act should be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law.

EFA firmly supports the introduction of an exception which closely resembles the open-ended fair use exception in United States copyright law. This type of exception allows for flexibility in the application of copyright law and goes some way towards ensuring that, in the words of the US courts, we are able to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster".<sup>14</sup>

### Inflexibility of the current purpose-based exceptions

The existing fair dealing defences are strict, purpose-based defences that inhibit socially beneficial uses of copyright material and result in copyright law being used in ways that go beyond protecting legitimate interests. As a matter of principle, copyright should only be allowed to protect the genuine scope of legitimate copyright holder interests and should be a means of promoting creativity and development rather than an end in and of itself. In everyday practice, copyright holders should not be allowed to use copyright law as a tool for achieving purposes beyond that scope.

EFA submits that the existing fair dealing defences are fundamentally flawed in their construction and legal interpretation. Below we set out examples of how the strict nature of these defences limit both their usefulness and the extent to which people may make legitimate and beneficial use of copyright material

#### *Example 1 - reporting news: PM singing Happy Birthday*

In *The Panel Case*,<sup>15</sup> Channel Nine was successful in a copyright action against Network Ten. One of the items in dispute was a 17 second segment of the Prime Minister singing Happy Birthday<sup>16</sup> taken from Nine's Midday television program. The Full Court of the Federal Court determined that Ten's rebroadcasting of those 17 seconds was not a fair dealing for the purpose of reporting news.<sup>17</sup> The Court's analysis was not on whether the dealing was fair, but rather on whether the dealing was for the purpose of reporting the news. Whilst academic commentators have suggested that the issue of fairness should be considered before the issue of purpose,<sup>18</sup> the nature of the current exceptions tends to direct attention towards purpose. In *The Panel case*, the Court looked at whether or not the Prime Minister singing Happy Birthday was newsworthy.

<sup>14</sup> *Campbell v Acuff-Rose Music Inc* 510 US 569, 577 (1994); see *Sony v Bleem*, No. 99-17137 (9<sup>th</sup> Cir. 4 May 2000).

<sup>15</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* (2002) 118 FCR 417; [2002] FCAFC 146.

<sup>16</sup> One assumes the PM had the appropriate licence to perform that work: <<http://www.unhappybirthday.com/>>.

<sup>17</sup> Nor was it criticism or review; and the Court was also convinced that those 17 seconds were a substantial part of the Midday programme: *TCN Channel Nine Pty Limited v Network Ten Pty Limited (No 2)* [2005] FCAFC 53.

<sup>18</sup> M Handler & D Rolph "A real pea souper: the Panel Case and the development of the fair dealing defences to copyright infringement in Australia" (2003) 27(2) *Melbourne University Law Review* 381.

In its analysis, the Court embarked on "a misguided attempt to second-guess what is newsworthy".<sup>19</sup> The Court took the view that the Prime Minister's singing was shown only "for its entertainment value",<sup>20</sup> but in doing so failed to consider the broader context of the broadcast and the contemporary reality of the increasingly blurred distinction between news and entertainment.<sup>21</sup> The result is that the fair dealing for news reporting defence is a narrowly drawn exception that requires subjective analysis of what is newsworthy and perhaps disallows any copying for news reporting when the subject matter is inherently humorous.

The approach taken in *The Panel case* establishes a very strict application of the reporting news defence and puts judges in the position of subjectively determining what is newsworthy. In our view, in cases such as this the focus should be on the fairness and effect of the dealing in the context of the interest that is being protected. The outcome - that Ten was liable for infringing Nine's copyright in those 17 seconds of the PM singing - clearly goes far beyond protecting Nine's legitimate interests.<sup>22</sup> With an open-ended fair dealing provision, the duty of the Court would have been to analyse the fairness rather than the purpose of the dealing. In that analysis, the purpose of the dealing would be just one of a number of considerations. Whatever outcome may have been achieved under an open-ended system, in our view it would have been a superior process and framework.

#### *Example 2 - criticism or review: but only of copyright material*

Canada's fair dealing defence in respect of criticism or review is substantially similar to Australia's and gives another example of how the strict purpose-based defences allow misuse of copyright law. In the Supreme Court of British Columbia, an employer sued a union claiming that the union had copied the "design elements" of its website.<sup>23</sup>

The background to the case is that the union and the employer were in dispute. The union created a website that copied the general look of the employer's website, using similar colours, shapes and designs but with obvious changes, including different logos and slogans. The content of the union's website was, of course, completely different and consisted of a criticism of the employer's labour practices.

After determining that the union's copying was substantial, the court considered the union's defence of fair dealing for the purpose of criticism or review. The court found two reasons to reject this defence.<sup>24</sup> The first was that the union's website did not criticise the employer's website, which was what had been copied, instead the union's website was criticising the company's labour practices. The second reason was that there was no acknowledgement of the original website given.

The Australian exception refers to criticism or review "of that work or of another work", with "work" being defined as various types of work "in which copyright subsists".<sup>25</sup> This means that any copying for the purpose of criticism or review of social or other issues (such as labour or business practices etc) or, arguably, material in which no copyright subsists, cannot rely on the fair dealing

19 M Handler & D Rolph "A real pea souper': the Panel Case and the development of the fair dealing defences to copyright infringement in Australia" (2003) 27(2) *Melbourne University Law Review* 381.

20 *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* (2002) 118 FCR 417; [2002] FCAFC 146, [5], [113].

21 For example: Lumby, C. (2002), "The Future of Journalism" in Cunningham, S. & Turner, G. (eds), *The Media and Communications in Australia*, Crows Nest, NSW: Allen & Unwin.

22 At law, Nine's interest to be protected here was limited to the "cost and skill in assembling or preparing and transmitting the programme to the public": *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585, 599. How could Ten's rebroadcast of those 17 seconds be said to have unfairly interfered with that interest?

23 *BCAA v Office and Professional Employees Int. Union* [2001] BCSC 156.

24 *BCAA v Office and Professional Employees Int. Union* [2001] BCSC 156, [205].

25 *Copyright Act 1968* (Cth), ss 10(1), 41.

defence. This means that a fair dealing defence may, for example, be available to enable rebroadcasting a short segment from Ten's *Big Brother* programme for the purpose of criticising or reviewing that programme, but not for the purpose of criticising "reality TV" more broadly.

This narrow scope of the current fair dealing provisions also has implications for legitimate business practices that do not fall foul of trade practices law. For example, comparative advertising which involves no misleading conduct or trade mark infringement may be shut down by a copyright action. Such was the situation in a recent English case, where an advertiser depicting images of two competing publications was not able to argue fairness as a defence.<sup>26</sup> On the other hand, the more flexible approach available in the US allows businesses to make fair use of copyright material in these types of situations.<sup>27</sup> In such cases, EFA believes that an open-ended fair use exception should be available to defendants.

### *Example 3 - judicial proceedings or professional advice: but only lawyers*

The current law provides that copyright is not infringed by anything done for the purposes of a judicial proceeding. Whilst the definition of "judicial proceedings" extends to cover proceedings before any body that can take evidence on oath,<sup>28</sup> the reality of many 'administrative appeals' is that they must first be considered through an internal review process. Consider, for example, Centrelink Authorised Review Officers and reviews by Freedom of Information Officers. These internal reviews are conducted according to natural justice but without any power to take evidence on oath and as such do not attract a fair dealing defence.

The very same material, including copyright material, is often used during an internal review as is in subsequent judicial proceedings. However, the inflexible nature of the current exception gives no protection to those involved in these types of proceedings. It might be thought that copyright enforcement is unlikely in these types of cases, but as with private copying, it turns people carrying out normal and reasonable activities into infringers. Whilst a judicial proceedings exception without a fairness requirement should be retained, EFA believes that an open-ended exception should be available beyond the current scope of judicial proceedings.

The current law also affords protection to the giving of professional advice by lawyers and patent and trade mark attorneys, but this is also of unduly narrow scope. In many courts and tribunals, parties can and are represented by professionals other than lawyers.<sup>29</sup> Consider, for example, the growth of advocacy services provided by professionals such as planners, valuers and industrial advocates in proceedings before land, environment, planning and industrial relations courts and tribunals. An open-ended fair use should be available to these professionals.

There is no policy reason why a fair dealing defence should be strictly limited to judicial proceedings and lawyers, when in contemporary society a broader range of bodies and professionals now deal with legal and administrative issues. An open-ended fair dealing exception should be available in these circumstances.

### **The issue of uncertainty**

One concern that has been expressed about introducing an open-ended fair use provision is the possibility of creating greater uncertainty in the law. To some extent, all new legislation creates

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<sup>26</sup> *IPC Media v News Group Newspapers* [2005] EWHC 317 (Ch).

<sup>27</sup> For example: *Sony v Bleem*, No. 99-17137 (9<sup>th</sup> Cir. 4 May 2000).

<sup>28</sup> *Copyright Act 1968* (Cth), s 10(1).

<sup>29</sup> For example and to name just a few: the Commonwealth Administrative Appeals Tribunal (including regular non-lawyer advocates from Centrelink and the Department of Veterans' Affairs), the Queensland Land Court and Industrial Court, the NSW Industrial Relations Commission and the Victorian Civil and Administrative Tribunal.

some initial uncertainty but in EFA's view a well-structured open-ended exception is likely to reduce rather than increase uncertainty.

In respect of the existing fair dealing provisions, it has been said that the current "scope and operation of these defences in Australia are more uncertain than ever"<sup>30</sup> and that there are "substantial areas of uncertainty".<sup>31</sup> EFA agrees. The Panel Case, in particular, leaves a great deal of uncertainty about what will or will not be considered to be 'legitimate' criticism or review or reporting news. How are those who wish to report news to judge the newsworthiness of the material they are using? How is the issue of humorous criticism or review to be dealt with?

More fundamentally, the existing legislative framework of fair dealing is inherently uncertain and unnecessarily arbitrary. There are codified factors that must be considered when courts analyse the fairness of a dealing for the purpose of research or study, but not when looking at a dealing for criticism or review.<sup>32</sup> Sufficient acknowledgement of the copied work must be made when there is a dealing for the purpose of criticism or review, but not for research or study.<sup>33</sup> When reporting news, one must make sufficient acknowledgement of a copied work if it appears in a newspaper but not if reported by "means of a communication".<sup>34</sup> What about an online magazine or journal: must it make sufficient acknowledgement because of s 42(1)(a) or does it come within the s 42(1)(b) "means of communication"?

EFA submits that a well-structured open-ended fair dealing exception will have the effect of directing the attention of courts to the fairness of a dealing rather than the purpose of a dealing. The concept of fairness is well-known in Australian law<sup>35</sup> and, provided that any open-ended exception includes sensible factors, the general application of the exception is likely to settle within a reasonable time.

The outer boundaries or fringe of an open-ended exception can remain somewhat open and flexible and can be judicially developed in response to issues that may at present be unforeseen. Consider, for example, the issue of on-line thumbnailing of images and photographs as used by search engines such as *Google Image Search*.<sup>36</sup> To specifically foresee and legislatively accommodate such developments would be near impossible, but the open-ended fair use defence in the US has allowed those technologies and uses to develop in a reasonably balanced way.<sup>37</sup>

### **Introducing fair use will further harmonise our copyright laws with the USA**

One of the stated objectives of the Australia – United States Free Trade Agreement was to "Harmonise our intellectual property laws more closely with the largest intellectual property market

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30 M Handler & D Rolph "'A real pea souper': the Panel Case and the development of the fair dealing defences to copyright infringement in Australia" (2003) 27(2) *Melbourne University Law Review* 381.

31 D Lindsay, Senior Fellow at the Centre for Media and Communications Law, University of Melbourne: <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1065842.htm>>.

32 *Copyright Act 1968* (Cth), ss 40(2), 41.

33 *Copyright Act 1968* (Cth), ss 40, 41.

34 *Copyright Act 1968* (Cth), s 42. On this point, EFA believes that "sufficient acknowledgement" should not be an aspect of any fair dealing/use exception, particularly given the availability of other rights and remedies, for example *Copyright Act 1968* (Cth) Part V, Division 2A (electronic rights management information) and Part IX (moral rights).

35 For example, analysis of fairness is important in trade practices law, the idea of the 'fair trial', unfair dismissal and in equity more generally.

36 See: <<http://www.google.com.au/imghp?hl=en&tab=wi&q=>>>.

37 Certain online thumbnailing, for example, has been seen as fair use under US law: *Kelly v. Arriba Soft Corp.*, No. 00-55212003, (9th Cir. 7 July 2003), <[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/8E22982657C96BE188256D5C00518BF5/\\$file/005521oop.pdf](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/8E22982657C96BE188256D5C00518BF5/$file/005521oop.pdf)>.

in the world...".<sup>38</sup> Fair use has existed in the United States as a codified exception since 1976, and has been recognised at common law since the 1840s. Yet, with no explanation, harmonisation of Australian copyright law in this regard with the United States was unfortunately not included within the FTA.

This is an ideal opportunity to further harmonise our copyright laws with those of the United States, in this most important area.

### **What is "fair" use?**

The factors for determining whether a given use of copyright material is "fair use" under United States law are:<sup>39</sup>

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyright work;
3. the amount and substantiality of the portion used in relation to the copyright work as a whole; and
4. the effect of the use upon the potential market for or value of the copyright work.

The introduction of a fair use exception would not, as some copyright holders suggest, operate as a licence for "piracy" of copyright material.

A fair use exception would recognise that it is objectively reasonable, and that there are substantial public-interest grounds to permit reasonable, and typically non-commercial uses of copyright material by the public at large, instead of only by lawyers, teachers, students, and the media.

### **Fair use is a necessary part of the copyright "bargain"**

Copyright has been described as a type of bargain or social contract. In return for granting copyright holders an artificial monopoly on significant and profit-generating uses of material which they create, the public (who the monopoly) receive certain benefits, including the right to make non-significant and not-for-profit copies of otherwise protected material, and that copyright material reverts to the public domain after a set period of time, so that it can be reused and built upon to create new creative works.

The balance between the rights of copyright users and copyright holders has been moving steadily in favour of copyright holders for some time. This trend has manifested itself in ways including:

1. The term of copyright is steadily increasing. In the United States, the term has been increased several times from its original maximum of 28 years, to its current maximum of 95 years. As part of the AUSFTA, Australia extended its term of copyright from 50 to 70 years. It is accepted by many commentators that copyright in the United States has effectively become perpetual, with a further extension being granted as previous ones expire.
2. The digital age has allowed for technological protection measures (ie Digital Rights Management or other forms of "copy protection") which prevent users from copying or using legitimately acquired material, even where such use is clearly permitted by fair use or fair dealing. The circumvention of technological protection measures is prohibited even where the protected work is not subject to copyright (eg has fallen into the public domain)
3. Legislative "anti-circumvention" measures to prohibit the circumvention of technical protection

<sup>38</sup> See: <[http://www.dfat.gov.au/trade/negotiations/us\\_fta/outcomes/08\\_intellectual\\_property.html](http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/08_intellectual_property.html)>.

<sup>39</sup> 17 U.S.C. § 107.

measures, and ban the tools which would enable circumvention.

Copyright has never granted copyright holders total control over each and every use of copyright material, yet this is the direction in which the law is currently heading. Contrary to the position of some industry groups, the "fair" exceptions to copyright, and the replenishment of the public domain are the quid pro quo for the granting of the copyright monopoly – not the fact that works are created in the first place.

EFA submits that the introduction of an open-ended fair use right, together with specific exceptions for time-shifting and format-shifting, would go a long way towards re-balancing these rights in Australia.

### **Introducing fair use will not adversely affect copyright holders**

It has been suggested that the introduction of fair use, or a "private copying" right would be "opening the floodgates" to rampant "piracy" of copyright material, and would have a substantial adverse affect on copyright holders.<sup>40</sup> These arguments are demonstrably false.

### **Fair use will not authorise "piracy"**

Courts in the United States have never held that the so-called "piracy" of commercial copyright material (such as downloading commercial music, motion pictures, or software from the Internet) falls within the scope of fair use.

### **The vast majority of Australians would support a fair use right**

EFA submits that the vast majority of every-day Australians has the entirely reasonable expectation that they should be able to make reasonable and fair use of copyright material, without further compensation to copyright holders.

### **Lack of a fair use right causes a lack of respect for copyright generally**

To quote Lord Templeman, in the 1988 House of Lords decision in *CBS Songs Ltd v Amstrad Consumer Electronics Plc*:

"From the point of view of society the present position is lamentable. Millions of breaches of the law must be committed by home copiers every year. Some home copiers may break the law in ignorance, despite extensive publicity and warning notices on records, tapes and films. Some home copiers may break the law because they estimate that the chances of detection are non-existent. Some home copiers may consider that the entertainment and recording industry already exhibit all the characteristics of undesirable monopoly — lavish expenses, extravagant earnings and exorbitant profits — and that the blank tape is the only restraint on further increases in the prices of records. Whatever the reason for home copying the beat of Sergeant Pepper and the soaring sounds of the Miserere from unlawful copies are more powerful than law-abiding instincts or twinges of conscience. A law which is treated with such contempt should be amended or repealed."<sup>41</sup>

EFA respectfully agrees with Lord Templeman's thoughts on this issue.

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<sup>40</sup> For example, see the industry's comments on New Zealand's private copying reform: <[http://www.theregister.co.uk/2004/03/23/new\\_zealand\\_to\\_legalise\\_cd/](http://www.theregister.co.uk/2004/03/23/new_zealand_to_legalise_cd/)>.

<sup>41</sup> [1988] AC 1013, 1060.

## A flexible fair dealing/use defence is justified and necessary

Finally, EFA agrees with the argument that the "fundamental issue to be determined where a defence of fair dealing is raised should be the fairness of the dealing".<sup>42</sup> The existing purpose-based exceptions downplay (or overlook) the issue of fairness and direct undue attention onto purposes that are taking on an increasingly arbitrary appearance. As a matter of policy, why should the purpose of the dealing be more important than the effect of the dealing?

We further believe that an exception is required to the current anti-circumvention provisions to enable fair-use copying of copyright material. As the law currently stands, fair dealing copies cannot be made of material which is protected by technological protection measures (ie Digital Rights Management (DRM), or other copy protection). Because of the rapidly increasing number of works published using this type of protection, we believe that unless an exception to the current anti-circumvention provisions is made, the intent and practical utility of fair dealing (and fair use, if introduced) will be frustrated.

## Time-shifting and format-shifting

**Issue 4:** The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for time-shifting television and radio broadcasts – including underlying works, films, sound recordings and live performances - and if so, under what conditions.

**Issue 5:** The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for format-shifting, and if so, for what materials and under what conditions.

EFA firmly supports the introduction of specific exceptions for both time-shifting and format-shifting. The only condition we consider would be appropriate to impose on those exceptions is that the copies made under these exceptions are not for resale or distribution. We also believe that exceptions to the current anti-circumvention provisions are required for time-shifting and format-shifting, for the reasons described above.

EFA submits that these specific exceptions are required to provide certainty that the most common "fair uses" (time-shifting and format-shifting) are not an infringement of copyright and avoid the need for this issue to be litigated at great cost and expense. For instance, although most US legal commentators believe that making a personal use MP3 copy of a CD that a consumer has purchased would be fair use, some rightsholder organisations have argued to the contrary. To date, no cases have directly considered this issue. Although the Recording Industry Association of America appears to have recently changed its position and described personal use MP3 copies of purchased works on portable music players as being within fair use,<sup>43</sup> specific exceptions are needed to provide Australian consumers with certainty.

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<sup>42</sup> M Handler & D Rolph "'A real pea souper': the Panel Case and the development of the fair dealing defences to copyright infringement in Australia" (2003) 27(2) *Melbourne University Law Review* 381.

<sup>43</sup> See: <<http://www.aria.com/issues/ask/default.asp#stand>>.

## Back-up copies

**Issue 6:** The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for making back-up copies of copyright material other than computer programs, and if so, for what materials and under what conditions.

EFA considers that the policy reasons for the creation of the current exception are equally applicable to all media. The safeguarding of a person's investment in purchasing copyright material is an important policy consideration. This is all the more so with certain types of digital media, such as optical discs (ie Compact Discs, and Digital Versatile Discs), where a tiny scratch on the surface can render the media unusable. In the case of printed books and other material that is currently difficult to back-up, the law should retain the flexibility to accommodate the back-up schemes that evolve. For example, today a growing number of devices ease the difficulty of backing up vinyl LPs and many libraries are pursuing efforts to build and perfect high-speed book-scanning devices.

## Statutory licence for private copying

**Issue 7:** The Government seeks your view on whether the Copyright Act should be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances.

EFA strongly opposes the introduction of a statutory licence for private copying under any circumstances.

Introduction of specific exceptions or an open-ended fair use right would remove any need for a statutory licence and would be a fairer system. We consider that there have been no valid justifications put forward by copyright owners for the creation of a statutory licence, and the royalty collecting mechanisms this would necessarily entail.

Indeed, this seems to be the fall-back position of some copyright lobby groups, (who oppose the introduction of wider exceptions to copyright) whose message seems to be "no private copying should be allowed, but if it is allowed, then you have to pay for it."

EFA believes that any negative impacts (whether real or perceived) of private copying exceptions on copyright holders are far outweighed by the public interest in having these exceptions. In our view, there is no need for monetary compensation to copyright holders for these types of private copying. Indeed, there are many compelling arguments against the introduction of a statutory licence for private copying.

### Statutory "private copying" licences have been tried and have failed

The *Copyright Amendment Act 1989* (Cth) attempted to establish a statutory licence<sup>44</sup> for the private

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<sup>44</sup> *Copyright Amendment Act 1989* (Cth), s 135ZZM(1).

copying of audio cassettes, in combination with a royalty on the first sale of such cassettes.<sup>45</sup>

This scheme was struck down by the High Court in the case of *Australian Tape Manufacturers Association Ltd v The Commonwealth*.<sup>46</sup> The court held that the "royalty" was a tax, which was invalid by reason of non-compliance with s 55 of the Constitution.

The court also stated that "If we had not reached the conclusion that the 'royalty' was a tax, we would have been of the view that the imposition of the obligation to pay it involved an unconstitutional acquisition of property on other than just terms."<sup>47</sup>

Any future attempts to introduce a statutory "private copying" licence in combination with a royalty scheme would be clouded in uncertainty and may fail for the same reasons.

### **Statutory licences and royalty schemes are opposed by many copyright holders**

Many major copyright holders, including major record labels, are opposed to the introduction of statutory licences and "blank media" taxes.<sup>48</sup>

### **Introducing fair use will decriminalise private copying, not increase it**

As a practical matter, it is impossible to prevent the majority of private copying, such as recording a TV show for later viewing, or copying an audio Compact Disc to an MP3 player such as the Apple iPod. Such copying is widespread and is routinely undertaken by millions of Australians. In other words, the "floodgates" are already open. Illegality of private copying does not stop private copying and legalising this common practice will not increase it.

The effect of introducing a fair use right will be to decriminalise this private copying, and ensure that the simple and reasonable act of taping a TV broadcast to watch at a later time does not make you liable to prosecution.

### **Introducing fair use will not impact the revenue of copyright holders**

The vast majority of uses of copyright material which would fall under a fair use exception are currently being performed illegally, and without payment to copyright holders. The introduction of a fair use right would only reduce the revenues of copyright holders if it resulted in a decrease in the number of *paying* users of that material.

Further, copyright holders in the United States operate in an environment where their customers have a well-established fair use right, yet this has not hindered the commercial success of these copyright holders. Indeed, the United States is the largest exporter of intellectual property (including copyright) in the world.

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45 *Copyright Amendment Act 1989* (Cth), s 135ZZP(1).

46 (1993) 176 CLR 480.

47 (1993) 176 CLR 480, 495 per Mason CJ, Brennan, Dean and Gaudron JJ.

48 See: <<http://www.apcmag.com/apc/v3.nsf/0/C44354759D5193A0CA256F40000C30FF>>.

## Other matters: the FTA

**Issue 10:** The Government seeks your view on any other matters arising out of this Issues Paper.

A general fair use exception and specific exceptions for time- and format-shifting are also required to achieve appropriate balance in Australian copyright law in the face of changes mandated by the recent Australia – United States Free Trade Agreement. Under that Agreement, Australia has extended the term of copyright protection to the US term of life of the author plus 70 years. As a result, users of copyright works are now prevented from accessing and using copyright works for a significantly longer period of time than previously. For educational and scholarly users this effectively increases the cost of accessing information that would otherwise have moved in to the public domain. In the United States, legitimate users of copyright works are guaranteed access during the copyright term by the fair use doctrine. The same strong public policies that underly fair use in the US support the introduction of a similar exception to protect access in Australian copyright law.

A general fair use exception and specific exceptions for time- and format-shifting are also required to counter-balance the potential impact of legally-sanctioned technological protection measures. Section 116A of the *Copyright Act* currently regulates the use of technologies, tools and devices that can be used to circumvent technological protection measures that rightsholders add to control access to their copyright works. It provides a range of civil remedies and criminal penalties against the manufacture, commercial dealing, importation, making available online, advertising, marketing and supply of a device or service that can be used to circumvent rightsholders' technological measures. Section 116A(3) permits the making available of circumvention devices for enumerated non-infringing "permitted purposes" under the *Copyright Act*. Although section 116A does not ban the *use* of circumvention tools to make fair dealings of technologically-protected works, it prohibits the supply of circumvention devices for that purpose. As a result, it leaves users who wish to make non-infringing uses without any practical means of doing so.

The Digital Agenda Review received numerous submissions on this issue during its 2003 public inquiry. Several commentators noted that the interpretation of the definition of "technological protection measure" in the Full Court Federal Court's decision in *Kabushiki Kaisha Sony Computer Entertainment v Stevens*<sup>49</sup> case meant that the anti-circumvention ban was broader than the scope of copyright. In other words, supply of a circumvention tool would still violate section 116A(3) even if the purpose for circumvention was not copyright infringement. To address this, and preserve the ability to lawfully make non-infringing uses of technologically-protected copyright works, the January 2004 Digital Agenda Review Report recommended amendment of section 116A(3) of the *Copyright Act* to expressly allow supply or use of a circumvention device or service for any use or exception permitted under the *Copyright Act*, including fair dealing and access to a legitimately acquired non-infringing product.<sup>50</sup>

The potential for legally-sanctioned technological protection measures to supplant existing exceptions and limitations provides a strong public policy consideration for implementing that recommendation and for adopting a new statutory fair use provision. A broad fair use provision like

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49 Sackville J, at first instance, [2002] FCA 906 (26 July 2002). Reversed by Full Federal Court, French, Lindgren and Finkelstein JJ, [2003] FCAFC 157 (30 July 2003).

50 See Digital Agenda Review Report and Recommendations, prepared by Phillips Fox under commission by the Commonwealth Attorney-General's Department, January 2004, Recommendation 17, page 107.

the flexible four-factor test in US legislation would preserve the scope of existing rights reserved to the public under copyright law, and act as a bulwark against rightsholders' attempts to use legally-sanctioned technological protection measures to assert control over activities that are beyond the scope of traditional copyright law, such as personal copying and private performance.

Article 17.4(7) of AUSFTA requires Australia to further restrict the use of circumvention tools. This is likely to exacerbate the potential for legally-sanctioned TPMs to encroach into rights reserved to the public. The AUSFTA also requires Australia to adopt a ban on the *use* of circumvention tools. While the existing tools provision in section 116A(3) applies to vendors, the use ban will instead affect consumers. For instance, the US motion picture industry takes the view that playback of a legitimately-purchased DVD from another geographic region on a multi-region DVD player violates the "act" prohibition of the US legislation, even though no copyright infringement occurs. Since multi-region DVD players are common in Australia, implementation of AUSFTA will outlaw consumer behaviour that is currently lawful.

Finally, Australian law currently reserves criminal penalties only for commercial-scale infringement. Article 17.11.26(a) of the AUSFTA requires Australia to adopt criminal penalties for wilful copyright infringement, even when done without motivation of financial gain, to reflect the comparable provision in section 506 of the US law. Thus, the AUSFTA effectively requires Australia to adopt some of the more restrictive aspects of US copyright law and policy, but without the benefit of the counter-balancing copyright limitations that provide balance in the US regime. The flexible factor-oriented approach of the US fair use regime has protected US rightsholders' legitimate interests while providing balance in US copyright law since 1841. The same policy rationale supports introduction of a more broad fair use provision to provide flexibility and balance in Australian copyright law.

In the United States, overbroad legal protection for technological protection measures in the Digital Millennium Copyright Act has undermined fair use of technologically-protected works. The US anti-circumvention provisions ban both the act of circumvention of technological protection measures that control access to copyright works and the manufacture, importation, distribution to the public and trafficking of certain tools, technologies and devices that can be used to circumvent technological protection measures that control access to works or uses of those works. Courts in the US have held that fair use is not a defense to a circumvention violation.<sup>51</sup> Consumers are not lawfully allowed to circumvent a technological protection measure to make a fair use of technologically-protected digital media that they have purchased, and the circumvention tools and technologies that they would need to do so are prohibited. As a result, the use of technological protection measures backed by section 1201 has effectively redrawn the historical copyright balance between copyright owners and copyright users in US law.

Article 17.4.7 of AUSFTA requires the Australian Parliament to make amendments to section 116A to bring it closer to the anti-circumvention provisions in section 1201 of the US copyright legislation. However, the Australian Parliament has the opportunity in its implementation legislation to avoid the overbreadth of the US approach. Since an overbroad legal protection regime for rightsholders' technological protection measures runs the risk of overriding all existing Australian copyright exceptions and limitations, special care must be taken in implementing that obligation to avoid the overreaching impact of the US regime and preserve room for fair use.

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<sup>51</sup> *Universal City Studios v. Reimerdes*, 111 F.Supp.2d 294 (S.D.N.Y., 2000); Aff'd under the name *Universal City Studios v. Corley et al*, 273 F.3d 429 (2<sup>nd</sup> Circuit, 2001).