

Fair's Fair (Except When it Isn't): The Effectiveness of Fair Dealing in the Australian Publishing Industry

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IN NOVEMBER 2016, THE AUSTRALIAN PRODUCTIVITY COMMISSION (PC) RELEASED A report¹ proposing a 'fair use exception to replace the current system of fair dealing exceptions' (ACC 1) in the Australian *Copyright Act 1968*. The Commission's recommendation supported the Australian Legal Reform Commission's (ALRC) findings in its 2013 report 'Copyright and the Digital Economy', which stated that a flexible fair use provision would "enable the Act to adapt to changing technologies and uses without the need for legislative intervention" (ALRC 95). In the event that a fair use exception is not viable, the ALRC also proposed an alternative 'new fair dealing' exception, to broaden the doctrine's purposes for educational institutions and commercial organisations.

For publishers and writers, these changes pose a threat as well as freedom. Copyright law protects an author's unique expression by way of rewarding them with exclusive rights—moral and pecuniary. But unique expression almost always finds its foundations in another's work. In this case, we have the right of fair dealing to enable what might be described as a new, transformative work—one that borrows from, and adapts, the original work to create something progressive.

¹ The original paper was updated on October 2019 to include reference to the Department of Communications and the Arts Copyright Modernisation Consultation Paper, asking for further views on three areas of the Copyright Act that may benefit from modernisation: flexible exceptions for special cases; contracting out of exceptions; and access to orphan works.

Another aspect of fair dealing exceptions is that they allow the copying of works for certain purposes. This would include, for example, research or study. In a completely interconnected world in which we have access to almost any work, is it fair to punish the academic who wishes to access, for free, an excerpt for a paper? Or the Fan-Fiction writer, who creates an entirely new novel based on existing characters? And what of the right to quote another's work in a commercial publication? With mash-ups and remixes becoming ever more prominent, what is 'fair' has become a highly contentious assessment, particularly within Australia's legal system, which presents hurdles not evident in other jurisdictions such as the US, where 'fair use' presents a more flexible approach to the use of copyright protected material.

Yet, the Copyright Agency, The Australasian Mechanical Copyright Owners Society (AMCOS), the Australian Publisher's Association (APA), the Australian Booksellers Association (ABA) and the Australian Society of Authors (ASA) oppose a fair use doctrine and a 'new fair dealing' proposal claiming either will negatively impact authors' earnings (ACC 178) and prompt more litigation due to frequent copyright infringement of creators' works. Writers and artists earn little as it is, so it would seem unfair to use their works for free when they might otherwise be paid for that use. But, conversely, is it apt to apply a stamp of genius and originality to authors no doubt even more easily influenced by other writers in the contemporary literary field? To apply archaic laws to an entirely new landscape might in fact obstruct creativity and learning. As Lawrence Lessig suggests: '[W]e need to adjust the architecture of regulation, so the same value protected before in a different context can be protected now in the new context' (Lessig 115).

This paper argues that Australia's current fair dealing exceptions do not effectively balance authors' rights with users' rights, in the contemporary publishing industry. In particular, the option for a broader use of purposes, over a full-scale integration of a fair use doctrine, will foster a rapidly changing publishing landscape—one less influenced by commercial publishing monopolies and a romanticised perception of the author as genius, and more responsive to the collective aims of knowledge sharing and individuals' derivative uses of intellectual property—with a minimum infliction on the current legal framework.

Review of the PC and ALRC Recommendations

In its paper, the ALRC suggested that Australia's current fair dealing exceptions are rigid and 'confined to prescribed purposes' (ALRC 93), which do not allow for new, unlicensed uses that may result from progressive digital technologies (94). These current uses include:

Research or study;

criticism or review;
reporting news;
parody or satire;
and giving legal advice.

This is unlike the US fair use doctrine, which assesses whether the use is fair, first, before allocating it to a specific purpose. What is fair in the US, therefore, is entitled to a robust discussion and analysis, which is able to consider new technologies within the creative industries, as they arise. In Australia, before an assessment of whether the use is 'fair', it must fall into one of the categories listed above. If the use does not, then it cannot pass the first hurdle and is deemed an infringement. Clearly, given the prescriptive and narrow list, most uses, even those that could be seen as transformative without impinging on the commercial value of the original work, cannot be permitted.

In 2015, the Australian Government asked the PC to examine the ALRC report and advise on Australia's current IP laws. The PC also determined that Australian copyright law favours authors' rights over users' rights (see cases *De Garis* and *University of NSW*), and that fair dealing provisions should be reviewed (PC 2). The ALRC report recommends 'four fairness factors' (following the US model) as well as a 'non-exhaustive list of illustrative uses' (10), which limit the doctrine's 'application to infringements that undermine the ordinary exploitation of a work at the time of the infringement' (ALRC in ACC 18). In essence, this would allow for uses not currently available in the Act. The recommendation also incorporates use of out-of-commerce works and orphan works, if copyright holders cannot be easily identified.

In the event that fair use is not implemented, the ALRC and PC have proposed an alternative by way of a new fair dealing exception that 'consolidates the existing fair dealing exceptions in the *Copyright Act* and introduces new purposes' (ALRC 162), including quotation, non-commercial private use, incidental or technical use, library or archival use, education, and access for people with a disability (162).

As mentioned, unlike US fair use, which determines the 'fairness' of the use before its purpose (162), the new fair dealing exception would determine if the use falls into one of the purposes *before* deciding if the use is fair. This test, however, reflects Australia's current process, the difference being the broader purposes. The new fair dealing proposal, therefore, appears to be more in line with Australia's current legal framework.

What Will this Mean for Users of Copyright Material?

Because most fair dealing cases involve works that are transformative, and which require guidelines that must be met to prove the new works' legitimacy (Lahore 7), they cannot be compared to piracy, which is unadulterated copying and where, in most cases, the copied work is sold for profit. For publishers and writers, there is some anxiety over this precise distinction. This is not to suggest that they are naïve to the intricacies of the law, but rather that the law is perhaps often unable to adequately articulate this distinction due to the outcomes of certain cases. For an example of how this anxiety might arise, we can look towards education and academia—areas where there is a clear need to borrow and integrate works (authors borrowing theories and principles from past academics to build on that knowledge for further research) *and* works of fiction (though the latter might prove more problematic and require a greater degree of transformation) (Brudenall 449). Works that impinge on derivative *commercial* opportunities for original authors also inform fair dealing/fair use outcomes. In the US, a book of specific vocabulary used in the Harry Potter series impinged upon J. K. Rowling's opportunity to devise a Harry Potter lexicon of her own (*Warner Bros. Inc. v. RDR Books* [2008]), despite that work being an arguably new and unique publication in its own right. However, also in contention, here, is the confusion the derivative work may generate: does the derivative work have the potential of being attributed to the author of the original, and, if so, could this incorrect attribution affect the original author's exclusive economic rights by way of Rowling no longer having the opportunity to create her own lexicon?

Needless to say, there may be some examples where the use actually benefits the title's economic potential. *Authors Guild, Inc. v Google* [2013], albeit heard in the US, has been cited by the Australian Publishers Association, to argue against a 'fair use' style defence. The Authors Guild petitioned to the US Supreme Court and sought leave to appeal against the Second Circuit Court's unanimous decision to allow excerpts of books in copyright to be included on the Google website (at 15). But discussion within the hearing suggested that the excerpts could possibly generate interest in the original work on a scale not otherwise achievable: 'Fair use, when properly applied is limited to copying by others, which does not materially impair the marketability of the work which is copied' (*Harper and Row Publishers, Inc. v National Enterprises* [1985], quoting Nimmer, 1200-1201).

This is a perspective shared by L. Ray Patterson in his article 'Free Speech, Copyright, and Fair Use', in which he stated that 'the original doctrine of fair use was intended to apply only to fair competitive uses of a work, with use by consumers being outside its ambit and therefore permitted' (Patterson 40)—a sentiment also shared by many participants in the ALRC's investigations, who suggest that law reform is needed to adapt to the digital era. In its submission to

the inquiry, Google claimed that 'innovation and culture are inherently dynamic' and that 'you cannot legislate detailed rules to regulate dynamic situations; you can only set forth guiding principles'.² A similar report from eBay claimed that sellers using its site infringe copyright regularly via photographs of book covers or clothing embellished with artwork. In eBay's view, in this instance, 'there is no loss or damage suffered by a copyright owner'. It submitted that within its business, and 'a wide range of markets', a fair use exception would provide 'an opportunity to prevent the occurrence of repeated technical infringement of copyright'.³

These arguments appear to be valid in accommodating everyday users' access to and use of copyright works in a digital and globalised era, but from a publisher's and author's perspective, there is a sense that opening the floodgates could pave the way for more uses where the distinction being what is fair and what is not is potentially hazy, as well as allow for commercial uses, which may impinge on the author's exclusive economic rights. To maintain the legal status quo would certainly alleviate this anxiety. Before exploring the resistance and arguments, however, it is worth analysing in more detail fair dealing provisions as they currently stand in Australian law—a legacy from eighteenth century British law. In addition, historical publishing practice and the traditional perception of the author as 'creator' (Foucault) has, it might be argued, exacerbated the Australian courts' inflexible approach to fair dealing cases.

Australian Fair Dealing—As It Is Now

As noted above, Australia's fair dealing exceptions provide for the use of copyright material, without permission, for the purposes of research or study, criticism or review, reporting news, parody or satire and giving legal advice (*Copyright Act 1968*). The exceptions in the Act can be used as a defence for uses that may otherwise be an infringement of a copyright owner's rights. The purpose of these exceptions is to allow for transformative, downstream uses of existing works in order to progress the arts and sciences (Statute of Anne 1710), which is arguably a fundamental objective of copyright law (Alexander 17). On a practical, economic level, fair dealing also 'operates in situations where it is too costly and therefore inefficient to licence uses of copyright material. In these circumstances fair dealing may step in to facilitate the use' (De Zwart 97).

Australia's exception for the purpose of research and study also contains fairness factors, (*Copyright Act 1968*) (determined after the purpose has been identified),

² Google submission 217, *Copyright and the Digital Economy*, Australian Law Reform Discussion Paper (DP 79), May 2013.

³ eBay submission 93, 'A submission in response to the Australian Law Reform Commission's *Copyright and the Digital Economy* Issues paper', November 2012.

and allows for uses in academia and education, where the encouragement of creativity, innovation and learning is paramount. It is common in research, for example, for teachers to provide lecture notes for their students. The Act does not contain guidelines for uses such as quotation, however—a common practice in academic writing—which illustrates its narrow application (in contrast to UK law, which now has a quotation defence). Quotation has, however, been included in the list of ‘illustrative uses’ (PC 10) in the PC recommendation for the new fair dealing exception.

As has been discussed, the *Act* provides a two-step test: whether the dealing is (a) for one of the prescribed purposes and (b) if the dealing is fair.⁴ The first hurdle has proven problematic given the inflexible list of purposes, which do not encompass every use, particularly new uses as an extension of advanced technologies. Contemporary Australian courts’ application of fair dealing provisions, as a result, has been ad-hoc and informed by prior narrow interpretations of the Act. Chief Justice Gibbs said in *University of NSW v Moorhouse* [1975]:

The principles laid down by the Act are broadly stated, by reference to such abstract concepts as fair ‘dealing’ (s 40) and ‘reasonable portion’ (s 49) and it is left to the courts to apply those principles after a detailed consideration of all the circumstances of a particular case. (at 12)

The abstractedness of fair dealing concepts is compounded by the courts’ readiness to affirm the rights of the author. In circumventing the vague fair dealing exceptions, decisions in Australian courts appear to have tipped the balance in favour of rights holders, which does little to encourage sharing ideas and information. In separating the artist from the work, the industry appears to have created a division between providing protection for the work and protection for the artist/writer.

Australian Fair Dealing in Action

University of NSW v Moorhouse was a benchmark Australian case that investigated whether photocopied documents from publications within the University of NSW library had infringed copyright. At the time, photocopying machines were the technology causing the problems associated with the infringement, via users’ effortlessly copying excerpts and larger sections of books in the University’s library. Nowadays when we go to print something at the photocopy machine, we notice a warning as well as an outline of the fair dealing provisions (usually

⁴ The *Copyright Act 1968* ss 40 to 43, as well as equivalent provisions in Part IV of the Act for subject matter other than works (including published books).

printed and displayed above the photocopier). But before *University of NSW v Moorhouse*, the extent of copying was somewhat unregulated, hence the wrath of the plaintiff, Frank Moorhouse, whose collection of short stories titled *The Americans, Baby* had been extensively copied by students at UNSW. In order to avoid necessary clarification of the fair dealing exceptions for the purpose of study and research, which would require an investigation of whether the copying constituted a 'substantial part' of the work as well as ascertaining whether the copying was significant enough to warrant a verdict of infringement (or not), the High Court of Australia focussed the law elsewhere: on authorisation (Torremans 99). This is because the concept of 'fairness' is not articulated in Australian copyright law and there is a risk in applying a vague concept to uses where authorised infringement could apply, perhaps because Australian courts are simply not practiced in determining fairness in the same way as the US. Again, problems at the first hurdle ensure that the second is never navigated. The result in *University of NSW v Moorhouse* was that the court was able to protect the exclusive economic rights of the author without directly addressing the imminent influence of new technologies. Unfortunately, this avoidance has set a precedent for courts' decisions in similar cases to date.

1. *De Garis*

Almost two decades after *University of NSW v Moorhouse*, similar obstacles were encountered in *De Garis v Neville Jeffress Pidler Pty Ltd.* [1990]. The *De Garis* case again sought to apply the fair dealing exception for the purpose of 'research or study' (Copyright Act 1968 s 40(2)). The applicants, Mr De Garis and Mr Moore, claimed that the respondent, Neville Jeffress Pidler Pty Ltd, had infringed the copyright of their works via the respondent's press-clipping service, which provided paying clients a photocopy of the claimant's journalistic articles, as well as a statement of the source (*De Garis* at 20 and 25). Jeffress claimed three fair dealing exceptions—fair dealing for the purpose of research or study, criticism or review, and the reporting of news—as well as an implied license to reproduce the works (at 5, 10 and 15). Justice Beaumont found that none of Jeffress's actions could be said to be for any of the purposes listed. In reference to the purpose of research or study, Beaumont J claimed that Jeffress's activities were in the normal course of trade and could therefore not be considered research (at 30).

The outcome in *De Garis* failed to extend the meaning of research to accommodate commercial activities. But disallowing commercial uses is shortsighted when considering how information is acquired and used in a modern context. In applying its strict dictionary interpretation of the terms 'research' and 'study', the court in *De Garis* could not find an exception.

2. *Pokemon*

Similarly, but with a more commercial emphasis, *Pokemon Company International, Inc. v Redbubble Ltd. (Pokemon)* cemented Australia's propensity for focussing on authorisation when issues of fair dealing arise. Pokemon Company International sued Redbubble—a company that provides a design service allowing consumers to create images that can be purchased via the Redbubble print-on-demand website and uploaded to items such as T-shirts and iPhone covers. Some designers had used the website to sell their mash-ups of the Pikachu character from the Pokemon merchandise. The mash-ups consisted of the Pikachu character dressed as Thor and Ziggy Stardust (among other characters). Pokemon claimed that Redbubble had infringed their copyright by making the artworks, publicly exhibiting them on their website, and authorising the reproduction of the infringing artworks. The court rejected Redbubble's claim that the works constituted fair dealing for the purpose of parody and satire, stating that the works were clearly made for commercial exploitation. Although the court did acknowledge that the mash-ups were unable to generate any royalties for Redbubble, due to their derivative presentation, which would not have been covered by a specific design patent, they again focussed on the question of authorisation. Redbubble, although it published a take-down notice on its website, had failed to remove the infringing artworks from sale. There was also a clear disregard for the commercial use of the Pokemon image and the court, without question, deemed the use as an infringement of the original creator's economic rights.

This recent case continues to perpetuate the first-hurdle problem: after failing the prescribed purpose of parody and satire, there is no ability to explore the work as fair; rather, a focus on authorisation allows the court to come to its verdict by circumventing the question of fair dealing almost completely. In addition, commercial uses appear to be completely off-limits. As an example of what might be possible with a broader list of prescribed purposes (as suggested by the ALRC), as well as regard for commercial use, Canada's discussion of *University of NSW v Moorhouse* in *CCH Canadian Ltd. v Law Society of Upper Canada* [2004] (*CCH*) is revealing.

3. *CCH*

In the Canadian Court of Appeal, Chief Justice McLachlin stated: 'In my view, the *Moorhouse* approach to authorisation shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole' (*CCH* at 42). This case was brought to the Supreme Court of Canada by a group of publishers of law sources (articles, statutes and decisions) who intended to sue the Law Society of Upper

Canada for copyright infringement for providing a photocopying service to its patrons, as well as single copies for outside requests, of the works in question. However, the Law Society claimed that the photocopying was 'research' within the meaning of s 29 of the Canadian *Copyright Act RSC 1985*. The Court's willingness in *CCH* to embrace a robust investigation of the concept of fairness and its broad interpretation of the term 'research', within the meaning of s 29 of the Act, addressed the impact of new technologies on printed materials (i.e., the immediacy of photocopying machines). The Court also advised that the word 'research' was to be interpreted liberally and that it shall not be restricted to 'non-commercial or private contexts' (*CCH* at 62). The Law Society's actions, therefore, were deemed synonymous with the renegotiated concept of 'research', (*CCH* at 51) and the impact of the library's photocopying service on the market for the original was considered minimal and, thus, fair (*CCH* at 73). Interestingly, the regard for commercial use was also progressive.

There has been no evidence in Australia of such a shift in thought or application. If the Canadian Supreme Court embarked on an investigation of whether photocopied materials were fair dealing for the purpose of private study and research, and that the research should not be confined to non-commercial uses, Australian courts have seen no merit in this approach. In addition, cultural discourse in relation to publishing monopolies and how publishers perpetuate an author-centric ideology show a propensity to retain exclusive economic rights, which is arguably at the core of the publishers' aims. The outcome in *CCH*, however, balances the rights of the user in much more equal terms in a renewed landscape. The court allowed consideration for the public interest and accounted for new technologies and the myriad ways in which we now access authors' works. This is not to suggest that the shift has averted the importance of rewarding authors for their unique works; rather, the case broadened the list of uses without avoiding a close analysis of whether the use was fair. In contrast, Australia still holds the author as genius above such equitable discussions. But what might the stakeholders' arguments be in relation to the ALRC's proposals; and are some of these views warranted?

Why Are Australian Publishers Opposed?

In the PC and ALRC recommendations, book publishing is part of many represented creative industries, yet opposition from the stakeholders in this field—publishers, authors and vested organisations such as the APA, ABA, ASA and AMCOS—has been emphatic (PC 178). This is not surprising given how new technologies have transformed the way readers use, absorb and disseminate texts, which has impacted on the industry on the whole (Thompson 174). Material is easily accessible via the internet, and creators are able to integrate extracts of other works into their own, without payment or acknowledgement. But the

industry has also proven to be dynamic and fluid, encompassing ‘creativity, technology and markets’ (Patry 225), and has survived the threat of disintermediation (i.e., consumers and authors bypassing traditional publishing practices and conventional ways to access literature). So why would a broader interpretation of fair dealing be such an insurmountable obstacle?

An Analysis of Current Research

To understand how new fair dealing provisions might affect the industry, a number of organisations⁵ asked PricewaterhouseCoopers (PwC) to investigate how new fair dealing provisions have affected publishing in other countries, and to assess the costs and benefits of the findings in the ALRC’s study (PC 179). This research was targeted directly towards the education sector.

PwC noted that the effect of new fair dealing on the Canadian educational publishing industry has been detrimental. In its findings, PwC stated that there had been a ‘98 percent reduction in copyright fees for Canadian authors and publishers and the closure by a major publisher of its Canadian K to 12 publishing operations’ (PC 179). That ‘education’ is included in the illustrated uses in the ALRC recommendations has put some Australian educational publishers on alert. However, the PC considers that not all education uses should be presumed fair, and it will be up to the courts to decide this on a case-by-case basis (precisely where fair dealing distinguishes itself from piracy). The inclusion of education in the illustrative purposes, however, does allow for a broader application (179).

The Australian Digital Alliance, however, also commented on the PwC report and shed some light on some other factors that contributed to the demise of the Canadian educational book industry (160). It cited a 2013-2014 Oxford University Press Annual Report, which illustrated a ‘decade-long decline in the Canadian market for educational resources during which purchases of materials have fallen by nearly 50 per cent’ (160). In addition, it has been identified that after Nelson Education Ltd. (Canada) went into liquidation in 2012, the reason was not copyright reform, but, rather, reduced spending in schools and a shift to digital products over textbooks (160). While most of the PwC study focussed on how the changes might have affected publishers, further investigations have seemingly raised evidence to support law reforms’ potentially detrimental impact on individual authors, too.

⁵ APRA AMCOS, Copyright Agency, Foxtel, News Corp Australia, PPCA and Screenrights commissioned PricewaterhouseCoopers (PwC) to undertake a study of the effects of a fair use proposal from the ALRC findings.

1. *The Australian Educational Book Publishing Industry in Decline?*

In its response to the new fair dealing recommendations, the Australian Society of Authors (ASA) and the Australian Publishers Association (APA) have cited a 2015 Macquarie University study, which suggests that the average author income has dropped almost 50 percent in the last 17 years (Throsby, Zwar and Longden). In the case for fiction writers, however, the Macquarie report in fact shows that writing makes up a fraction of authors' overall incomes (22). Furthermore, the study suggests that authors' incomes derived directly from their writing are paid from sources other than Copyright Agency collections—i.e., Government funding, advances, and Public Lending Right / Educational Lending Right (PLR/ELR) payments (22). It could be argued, therefore, that authors generally earn very little money from their writing, with or without law reform. The research also suggests that other factors impact their earning capacity, such as an inability to promote their work, and outright plagiarism (again to be distinguished from fair dealing). Another important thing to note is that law reform has not commenced—further supporting that authors' incomes could be in decline as a result of other factors.

The ASA and APA have also focussed on the Canadian educational book industry as an example of what might happen in Australia with the introduction of new a fair dealing defence, again using the Macquarie University report. The details of the report, however, suggest that the current income earned by educational-text authors is predominantly generated via their work as scholars and teachers (21), as well as a smaller percentage, again from advances, government funding and PLR/ELR payments, and then Copyright Agency Limited (CAL) collections (21). It appears that the ASA's concerns stem from the PC's willingness to broaden the purposes of fair dealing. These broader purposes encompass many uses that currently require permission and/or remuneration for the use, such as quotation. Broadening the scope of the use to commercial contexts also makes publishers and authors nervous about not being remunerated for the use of their intellectual property. The US case, *Authors Guild, Inc. v Google* [2013]) has exacerbated this concern. Although the outcome of the case deemed the excerpts to be fair use, the fact that the authors whose excerpts were distributed were not consulted beforehand raises a red flag. Might a more flexible fair use doctrine embolden users to take more, use more, outside the watchdog radar, without assessing the impact? The PC's stipulation that any change to fair dealing laws would 'coexist with the current education statutory licensing scheme' in Australia (PC 169) might help to alleviate this concern, however, by reiterating that the bulk of royalty payments comes via collection agencies as opposed to individual use.

2. CAL Payments

After *University of NSW v Moorhouse*, a copyright collection agency was formed (now known as the Copyright Agency Limited (CAL)), which enacted a statutory licensing scheme, specifically for educational institutions, now included in Part (VB) of the Copyright Act.

CAL collects payments on behalf of authors, for use of their material in schools and universities across the country (Copyright Agency). When first introduced, the licensing scheme appeared to provide some protection for academic institutions that were otherwise potentially 'infring[ing] the Copyright Act many times a day' as well as 'secondary school teachers who give their pupils photocopies of extracts of textbooks' (Kerrigan 1968 in Copyright Agency). The scheme proved particularly helpful for 'high-volume, low-value' (PC 153) transactions, where negotiation with individual rights holders would be prohibitive (153).

In *CCH*, the Canadian Copyright Licensing Agency (the Canadian CAL equivalent) acted as the intervener between rights holders and the Law Society of Upper Canada library. Unlike the *Moorhouse* case, in *CCH* royalties were already collected on behalf of the authors. This was not seen as integral to the outcome in *CCH*, however, and the court decided that 'the availability of a licence [was] not relevant to deciding whether dealing has been fair' (Kishani Mendis 118). This means that an educational institution is not automatically free from liability because it pays a fee to use copyright works (118). Collection agencies ensure that remuneration for authors is proportionate to the use and, in this way, work alongside fair dealing exceptions rather than providing protection for infringing uses.

3. Berne Convention Requirements

In proposing fair use, or alternatively fair dealing exceptions, in their investigation, the ALRC also considered Australia's international obligations. Australia is signatory to the Berne Convention, which, in art 9(2), provides:

It shall be a matter of legislation in the countries of the Union to permit the reproduction of works in certain special cases, provided the reproduction does not conflict with a normal reproduction of the work and does not unreasonably prejudice the legitimate interests of the author. (*Berne Convention* art 9(2))

Rights holders and their advocates, however, have criticised the ALRC's fair use defence proposal as not being consistent (ALRC 224-6) with this three-step test. The first step, in particular, appears to be the point of contention and refers back to the identification of a rigid list of limitations or 'special cases' (227). Rights

holders claim that fair use exceptions will undermine the clarity of these 'special cases' while those in favour of fair use claim that 'the three step test does not preclude the introduction of open-ended exceptions' (227) and that the three-step test was intended to be 'an abstract, open formula' (Senftleben in ALRC 118).

But based on further analysis of whether countries that utilise fair use exceptions, or a broader interpretation of fair dealing, have compromised international treaties (201), the ALRC could find no evidence (236). Furthermore, the new fair dealing proposal, in particular, is seen as being more compatible with the three-step test due to the explicitly defined 'special cases' being the fair dealing 'specific purposes' (167).

Essentially, the broader purposes for new fair dealing, as well as the broader applications for both commercial and non-commercial activities, does not eliminate the need to ascertain if the dealing is fair. The decision must still be decided on a case-by-case basis considering all the facts, as well as the impact of the dealing on the market for the original. Despite these assurances, the Copyright Agency, along with other collection agencies for music such as APRA and AMCOS, continue to express concern about protecting artists' intellectual property. What other factors could be considered in trying to understand the concerns of rights' holders? Are they legitimate?

Book Publishing—A History of Monopolies

William Patry, in his publication *How to Fix Copyright Law*, describes the common reaction to instigating fair use, by those with vested interests in monopolies, as a 'moral panic' (Patry 211). Patry argues that these vested parties demonise the fair use doctrine or any broadening of fair dealing principles because they 'oppose adapting copyright to the digital era' (211) and want to 'preserve the status quo through creating a false enemy whom, we are told, must be vanquished for the alleged good of society as a whole' (212). Lawrence Lessig also perfectly articulates the dilemma in applying current law to modern usages: 'Merely because the platform through which we get access to our culture has changed, the presumptive reach of copyright law has changed, thus rendering this... material presumptively illegal under the regime we inherit from the 20th century' (Lessig 118).

Without disregarding any legitimate concerns from publishers, there is no doubt that the history of book publishing in Australia indicates that this resistance can be founded in publishers' and booksellers' exclusive economic interests. In essence, publishers and booksellers view fair use, and presumably any extended fair dealing provisions, as 'reduc[ing] the financial rewards accruing to authors because copiers do not pay royalties' (Torremans 104). But as has already been

noted, this is not the landscape of today's creative and cultural industries. Nicholas Suzor reiterates the difference between the traditional industry, which is based on an entrenched view of copyright law as encompassing a system of 'incentives and rewards' (Suzor 299) for exclusive content, and where the contemporary publishing industry might instead be heading: 'creativity as ordinary and abundant and emphasizing the importance of access to creative expression in order to enable individuals to learn, grow, share and engage in creative play' (299). But, as he also points out, the perpetuation of scarcity via copyright law will continue to suppress the reuse of cultural products to create new ones: 'As long as scarcity is viewed as fundamentally necessary in order to stimulate future production and progress, increasing access by decreasing exclusivity will continue to be counterproductive' (314).

Surveying the impact of an author-centric view and its historical underpinnings within publishing practice can, however, facilitate some understanding of the position of the book publisher and author in the fair dealing debate. Industry, legal and academic discourse from the early 1700s to the 20th century attempted to define terms such as 'original', 'fair' and 'substantial part' (Alexander 232), in the context of the author-centric landscape in which the author was seen to have a unique attachment to their work that could be termed proprietorial (30). An idealised view of the author only served to highlight derivative works as being an imitation of another's expression and this has impacted the culture of our book publishing industry today. The author-centric culture simply does not translate well in the digital era. As Carys Craig points out: 'the moral divide between... origination and imitation... captures and hypostasises a moment in the evolution of authorship; and that moment has passed' (Craig 16). New technologies will achieve even more access in the future, exposing us to vast stores of cultural content (Day 82). The ease in which we are also able to access and use works, potentially for free, also presents a democratised literary field in terms of dissemination and creation. Almost every new work can be attributed to an influencing source. Indeed, 'appropriation, adaptation and reinterpretation of existing texts is an established mode of cultural meaning-making' (Craig 174).

In light of this, the degree of originality in the work may be disproportionate to the author's expectations of its commercial value (Torremans 99). This works both ways: appropriative works can be openly resistant to the concept of copyright as a commodity, and, instead, the sharing of ideas and expression is becoming 'communitarian' and valuable to our ongoing 'cultural dialogue' (Craig 25). In viewing writers and users as 'communitarian' (Gibbons), this paper suggests that restrictive legislation appears to reward authors on the one hand and punish them on the other: their exclusive economic rights may be protected, yet that right also impedes them in their creation of derivative and/or transformative works.

Balancing the publishers', authors' and public's interests has, therefore, always been a struggle, in which the fair dealing exceptions have attempted to offer vested parties some middle ground. But the publishing industry still holds on to the romantic vision of the author, and uses it to argue for greater protection of exclusive economic rights, despite the literary field becoming more democratised. Judging from the ASA and APA's citing of the Macquarie University study, it appears this view remains. Does this argument actually benefit the author, though? Particularly in the digital era, the author has proven very adaptable, sometimes bypassing traditional publishing avenues and self-publishing on their own terms (Masson 75). It appears that the publisher's position is more precarious than ever, and perhaps their passionate response to the proposed legal reform is warranted. An author, now, has the means, via online communities and digital technology, to survive on their own; the publisher, however, who relies on the author for their work, might not.

Conclusion

The PC's recommendations clearly highlight a need to adapt the existing legal framework to accommodate new digital technologies and the ways in which we access and use copyright works in contemporary society. Reform is also necessary to better align the Australian *Copyright Act 1968* with international obligations.

While the *Act* has introduced extended provisions incrementally (*Copyright Act 1968* subsection 1(b) to 8), these provisions continue to be interpreted restrictively by Australian courts (see cases *University of NSW v Moorhouse* and *De Garis v Jeffress Pidler*). A more interventionist approach, therefore, is essential to allow the Australian legal system to move forward to tackle new fair dealing uses in the digital era. The APA suggests that this reform could be approached in two ways: (a) introducing a US-style fair use doctrine, which will determine the fairness of the use, first, allowing for future derivative and transformative works, and to future-proof contemporary cultural activity; or (b) drastically expanding the fair dealing purposes to encompass a greater scope of uses without diverging from the current legal framework (PC 10). Evidence from Canada points to the latter being a viable option for Australia. A broader list of uses would reflect the ways in which we access and use works today. The first hurdle might also be navigated more easily to bring the courts to the important question of what constitutes fair dealing. But this is where the law could still fall short. Without a history of legal analysis, the distinction between outright piracy and fair dealing continues to plague authors and publishers. The vehement resistance to law reform from publishers, who manage, as an industry, to use their capital to influence the objectives of copyright law (Alexander 17) (in favour of the author's rights, hence their own) (23) stems from a fear, perhaps, that the distinction will somehow be breached. But a discussion of what is fair is precisely what is needed to avoid

piracy, is it not? Authors also fall into this gamut of the publishers' fears by way of their works still predominantly being produced and disseminated through publishing houses. But these particular fears disguise a greater threat to which the publishers have little control. Readers and users are moving away from purchasing and using texts in their traditional formats, in favour of online materials (23); and it seems that this will happen regardless of whether the law changes, or not.

Authors are also finding unique ways of creating new works outside of traditional publishing models (Masson 75), and their expectations in terms of sharing and using works is also changing. There is a greater acceptance of transformative and appropriative works (Craig 25). Indeed, sharing and integrating others' expression is par for the course in academia, and the freedom to use excerpts and quotes without embarking on lengthy searches and paying hefty fees is ideal. Could a statutory defence for fair quotation, at the least, assist here? Acknowledgement is also important for this type of use and can result in greater benefits to the author than direct payment (through knowledge sharing and citation in research, for example). Licensing agencies will also continue to collect royalties on behalf of the authors, often with the publisher taking their cut (PC 169).

In light of the above, therefore, the APA's proposal to introduce new fair dealing exceptions could not solely negatively impact the Australian book industry. Publishers' and authors' economic interests and fears of a *carte blanche* for fair dealing provisions should, therefore, should not impact on the decision to adopt new fair dealing exceptions, and law reform should be instigated.

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