

## Fair Use (Copyright Reform)

### Background

Australia's copyright law is outdated, inflexible and no longer fit for purpose in a world of increasingly ubiquitous digitisation and rapid technological change. The law is out of step with current societal practice and expectations and its inflexibility hampers innovation, creativity, education and freedom of speech while undermining the continued development of our cultural institutions.

Australia's current copyright law contains a limited set of exceptions outside of which any use of copyrighted material is deemed to be an infringement. This approach results in a wide range of significant issues, including the following:

- our schools are forced to pay to use material that is freely available online;
- researchers are restricted from using the latest text- and data-mining tools;
- artists, musicians and authors are unnecessarily constrained in their use of past works, even their own (all creative work is derivative);
- a range of innovative online businesses are effectively unable to be based in Australia;
- political speech is at risk of being censored due to copyright infringement allegations;
- there are existential threats to elements of our cultural heritage due to absurd restrictions on cultural institutions that prevent digitisation of certain materials;
- consumers are routinely 'technically' infringing copyright through such innocuous activities as sharing images on social media, creating memes and forwarding emails; and,
- general acceptance of the legitimacy of copyright is seriously undermined by this disconnect between the law and current societal practice.

### EFA Position

EFA supports the introduction of a **broad flexible fair use exception** into Australia's Copyright Act.

The introduction of a broad flexible fair use exception will bring Australia's Copyright Act into line with current societal practice and expectations and introduce essential flexibility into the law. It will provide resolutions for the issues noted above and ensure that the law enables, and is able to adapt to, innovations in technology, service provision, artistic practice, consumer behaviour and political speech.

Fair use has been a central principle in copyright law in the United States since 1978 and is also now used in Singapore, South Korea and Israel. Each of these countries boasts strong and dynamic digital economies.

Fair use provides an appropriate balance between the legitimate rights of all parties by asking whether each use is 'fair'. It therefore provides space for creative acts, technological and service innovation, social interaction and political speech, while protecting the interests of the copyright-holder.

**By definition, fair use does not apply to situations where the interests of the copyright-holder are harmed.**

There are dozens of specific exceptions in Australia's Copyright Act that can be replaced with a broad flexible fair use exception. Clearly, this will make copyright much easier to understand and will align the law with current societal practice and expectations. It will also remove the legal impediments to experimentation and innovation that are holding back Australia's digital economy.

Since 1998, there have been six separate reviews (see below) that have recommended much greater flexibility for Australia's copyright regime. Most recently, the Productivity Commission said a fair use exception will specifically "benefit Australian consumers, schools, other education institutions, libraries and archives"<sup>i</sup> as well as the wider economy. The Commission's Deputy Chair Karen Chester has also said,

*The challenge for policymakers is to focus on the near-silent majority of users, of adapters, of educators and creators that will need fair use to bring about the next wave of innovation, jobs and equitable prosperity. For its absence will simply foster a society of less haves and more have nots.*

*So for the Commission, fair use has become not a nice to have, or even a good to have, but a policy must have.<sup>ii</sup>*

**The evidence is clear. To fully realise the benefits of the digital revolution Australia must introduce fair use without further delay.**

#### **Reviews that have recommended greater flexibility in Australia's copyright regime**

1. Copyright Law Review Committee report on Simplification of the Copyright Act Part 1: Exceptions to the Exclusive Rights of Copyright Owners (1998) para 6.10
2. Joint Standing Committee on Treaties, Report 61 Australia - United States Free Trade Agreement, para 16.50
3. Senate Select Committee on the Australia-US Free Trade Agreement Final Report (2004) p72
4. House of Representatives Standing Committee on Infrastructure and Communications, At What Cost? IT pricing and the Australia tax (July 2013) at xiii
5. Australian Law Reform Commission Report 122 Copyright and the Digital Economy (2014) para 4.73
6. Productivity Commission Inquiry into IP Arrangements Draft Report (2016) recommendation 5.3.

*Policy release date: 1<sup>st</sup> May 2017*

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<sup>i</sup> See: <http://www.pc.gov.au/inquiries/completed/intellectual-property#report>

<sup>ii</sup> Speech to ADA Forum, Canberra, 24/2/2017. Available at: <http://www.pc.gov.au/news-media/speeches/fair>