# TABLE OF CONTENTS

**PREFACE**  
P 1

**EXECUTIVE SUMMARY**  
P 3

**SUBMISSION**  
P 8

- Introduction  
Para 1-5
- Objectives of the Review  
Para 6-8
- Background to Exceptions in Australia  
Para 9-15
- Proposed review of TPM and Anti-Circumvention Measures  
Para 16-17
- Market Based Solutions  
Para 18-22

** ISSUES 1–3: Fair Dealing and Fair Use **

- Fair Dealing Provisions: Comparative Certainty and Flexibility  
Para 23-29
- CAL's Views about a Fair Use System  
Para 30-35

** ISSUES 4–7: Private Copying and Related Issues **

- Time and format Shifting  
Para 36-41
- Back-Up Copying  
Para 42-44

** ISSUES 8–10: Other Exceptions, Statutory Licences and Other Reform Issues **

- Issue 8 – Other Exceptions and Statutory Licences  
Para 45-53
- Fair Dealing for Research and Study – not for commercial purposes  
Para 54-56
- Possible Fair Dealing Purpose of Parody  
Para 57-63
- Orphan Works  
Para 64-67
- Copying for External Students - Section 40(1A)  
Para 68-73

- Issue 9 – Other Options for Reform  
Para 74-77
- Certainty for Copyright Users  
Para 78-81
- Copying Undertaken for the Print Disabled  
Para 82-88
- Quantitative Tests  
Para 89-90
- Quantitative Tests – Sections 135ZG and 135ZMB  
Para 91-101
- Quantitative Tests – Section 40(3)  
Para 102-103
- Library provisions  
Para 104-105
- Preservation Copying of Rare Books for Libraries
- Extension of the power of the copyright Tribunal
PREFACE

WE’VE ONLY JUST BEGUN

One of the stories in the world’s most read book, The Bible, about the Tower of Babel reflects the ageless human challenge of communication breakdown. But from the moment peoples of different languages scattered across the earth, humankind has worked to break down those barriers.

From the wheel, to language interpretation and the written word, the printing press and the photocopier - and from the horse and cart to the combustion engine and air flight - we have succeeded in making our world, its people and the information and art we create more accessible.

The speed of change is rapidly increasing. While we know that new digital technology has already delivered a wonderful new era of access, the truth is we’ve only just begun.

Not long ago students could access only the books and periodicals their particular university held on campus. Furthermore, there were limited copies to be shared with many students and the campus library was the only place they could be accessed. Now, any student can access not just any book, but any individual article on any subject at any time.

An Australian living on a cattle station outside Broken Hill can get access to the latest international thinking on their chosen interest as quickly as the PhD student at Sydney University. Conversely, the author of that work has a bigger, more diverse audience and market for their work. Both outcomes are among the myriad of benefits derived from this new age of access.

With all welcome advances there come challenges. The technologically rich, from backyard hackers to major corporations, can steal or lock down information with equal ease. Small-time creators can be squeezed out and embryonic digital information industries can be swamped by major international players.

An environment of balance between user access and creator rights must be encouraged. Only in such an environment can both flourish using the new age of technology to build new markets, new business opportunities, easy access, and a vibrant exchange of ideas and works.

To err on the side of unfettered access will destroy developing new markets and rob creators of potential income. To err on the side of greater control will produce monopolies of information and a limited exchange of ideas.

The digital age is the international age. The barriers between Babel and Broken Hill have been broken down. Australian creators and users move freely in the international digital environment.

Just as any traveller moving across foreign territory has wonderful new experiences, there are responsibilities as well as new opportunities in the digital territory.
In the copyright world these responsibilities are best communicated through the Berne Convention and its Three-Step Test, the World Intellectual Property Organisation (WIPO) Copyright Treaty and The Agreement on Trade Related Aspects of Intellectual Property (TRIPS). These principles are reinforced in other ways such as the United States Free Trade Agreement.

Any shift in policy within Australia cannot be seen in isolation. We operate in a worldwide intellectual property marketplace.

If Australia moves out of step, in either direction, with our international agreements and partners, we risk either cheapening our product and undermining creativity and new business or being too rigid and unresponsive to the dynamics of the market, thus being left behind.

In either case, the Australian creative culture will suffer. A weakened copyright environment in Australia will simply discourage Australian creativity and encourage greater dependence on the creative culture that is encouraged by the stronger copyright environments of our counterparts in the United Kingdom, United States, Canada and Europe.
EXECUTIVE SUMMARY OF COPYRIGHT AGENCY LIMITED’S (CAL) POSITION

The two prime objectives CAL seeks to achieve for its member creators, clients and the public in any system are flexibility/responsiveness and clarity/comparative certainty. These principles form the filter through which we pass all recommendations and potential change.

In keeping with these objectives, CAL advocates balance. We argue against tightening copyright protection too far and advocate against the weakening of copyright protection so much that creativity, access, flexibility and emerging markets are strangled. The essence of CAL’s proposal is to restore the test of fairness to each of the fair dealing and library exceptions.

The Attorney-General’s “Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age Issues Paper” (the Issues Paper) is not only timely, but a welcome opportunity to set a policy and statutory framework in place that will best encourage creativity and communication, and motivate investment in the new digital age.

In short, CAL holds that what is required is a renewal – or renovation if you like – of the framework to better suit the digital age. CAL does not believe that either a total demolition and rebuild is required, or a quick-fix splash of paint.

To this end, the modernising renovation should not cobble together two quite different designs – Fair Use and Fair Dealing.

There are 10 issues raised for comment in the Issues Paper, CAL notes these 10 issues can be grouped into three broad subject areas:

Issues 1-3: Fair Dealing and Fair Use;

Issues 4-7: Private Copying and related issues; and

Issues 8-10: Other Exceptions, Statutory Licences and other reform issues.

In summary, CAL’s position on these broad areas is as follows:

Issues 1-3: Fair Dealing and Fair Use

• Under no circumstances does CAL support the addition of an open-ended fair use provision to the existing fair dealing arrangements. This would amount to the double dipping of exceptions and the substantial weakening of copyright in Australia. Such a move would be out of step with best international practice and our international treaty and trade obligations. No other comparable country has such a mix of provisions.

• CAL is concerned that to import fair use into the Australian context, would create a cane toad effect – whereby a short term solution becomes a long term disaster.
• CAL notes the addition of a United States-style *fair use* provision was advocated by some groups in response to the erroneous assumption the new commitments implicit in the US Free Trade Agreement (USFTA) shift the balance in favour of copyright owners.

• In respect of CAL’s areas of responsibility, the US fair use system:
  
  o is more restrictive than the Australian fair dealing system in terms of access to copyright material for educational institutions, libraries and corporations;
  
  o does not provide free and unfettered private copying; and
  
  o encourages litigation which creates uncertainty for users, creators, business and the public as a result of each case potentially shifting the boundaries based on the merits of each situation.

• Primarily, CAL supports the retention of the fair dealing system with some modernising amendments. CAL holds that the maintenance of fair dealing provides a logical continuum of Australia’s policy and legal framework to manage copyright.

• Fair dealing also provides comparative clarity for the emerging digital markets for content, reduces potential for lengthy and costly legal battles to settle the boundaries, and it rightly retains responsibility for this historic area of public policy in the hands of the people, through parliament. Thus, each of the exceptions is a purpose-built policy based on direct experience, information and debate. This is the appropriate way to deal with exceptions.

• The *renovated* fair dealing approach achieves the two core objectives of responsiveness and clarity without causing long term policy and practical crises.

• CAL, however, understands the prima facie view that the fair use system provides greater responsiveness and flexibility. To meet this important objective, CAL believes that modernising amendments to the fair dealing system are required. In summary, flexibility and responsiveness can be combined through the following:

  o the USFTA arrangements already initiate a new mechanism whereby any adverse impact upon the restrictions on the use of circumvention devices are having on the ability of a category of users to access works for fair dealing purposes in the digital environment are reviewed every three years;

  o removing the deemed quantitative measures from fair dealing which in the digital age are no longer appropriate; and

  o limiting scope creep from the fair dealing purposes so that they do not cover purposes they were never intended to – such as copying for commercial research or external students.
Issues 4-7: Private Copying and related issues

CAL notes that the Issues Paper makes much of concerns relating to the perceived inability of the current arrangements to deal with popular practices such as music and movie format and time shifting for private use. The music and movie genres are not within CAL’s usual policy or legal responsibility.

However, there are some important matters of principle from policy and precedent perspectives that need to be highlighted:

• Firstly, it makes for bad policy to allow popular practices to lead broad policy shift. For example, the introduction of a fair use system or generic private use exceptions on top of existing fair dealing provisions to alleviate some popular concerns (i.e. mums and dads recording programs to watch later and the kids downloading CDs onto MP3 players) would create unforeseen problems. It is akin to using a sledgehammer to crack a nut – and smashing the plate in the process.

Such problems could include uncertainty over the boundaries of what is allowed under fair use or a private copying levy, stifling of services and markets which could otherwise develop, and increasing costs of copyright trade through increased litigation.

• Secondly, there are few, if any, other areas of policy development that ignore important principles in order to change laws for the primary purpose of enabling popular practices. For example, speed zones near schools were reduced to curb the practice of driving too fast around schools; drug laws are being tightened, not loosened to reflect the fact that some in the community use illegal drugs; corporate governance and reporting requirements are being strengthened, not weakened in response to the practices of some corporate mavericks; and environmental protection is being increased in response to damaging practices, not weakened.

• Most importantly, CAL argues that this area of technological advancement has only just begun. It would therefore be an error of historic proportion to make a broad range of private practices copyright free before the market has determined the best business models to maintain creators’ rights while providing easy public access to creative works through innovative new content services.

• History is a great teacher if we are willing to learn from it. For example, had the government reacted in haste to the advent of the photocopier and the increasing propensity of the public to copy others’ work, it could have destroyed the rights of Australian writers and undermined the legitimate industry that has seen CAL return more than $300 million to Australian creative workers in less than 20 years, including, $45 million in 2003-2004 for the systematic multiple copying of their works. These payments foster Australian writing and publishing.

Therefore, CAL argues that private copying, which is now a major way that consumers use creative works, must be dealt with by a supportive framework that is not technologically specific and which provides for rights managed payments to creative workers who create and produce original work.
Issues 8-10: Other Exceptions, Statutory Licences and other reform issues

- Previous fair dealing provisions assumed old technology and are outdated. Therefore, CAL argues for the following amendments to the fair dealing system to make it more responsive to digital technology:
  - abolition of quantitative deeming measures to restore the fairness test to exceptions and take into account the changed impact of copying and communication in the digital networked environment;
  - amendment of the provisions relating to copyright, free copying, and online communication for external students; and
  - exclusion of the corporate sector from ability to rely on free library copying provisions for the purpose of research and study.

- CAL acknowledges that the pace of technological change can have the unwanted outcome that some in our community may be left behind. For this reason, CAL argues for inclusion of the following provision for disabled people:
  - requirement for development of industry guidelines to encourage the provision of materials in formats accessible by the print disabled.

- Other matters that CAL discusses are:
  - systems for access to orphan works;
  - inclusion of a fair dealing exception for the purpose of parody;
  - extension of the jurisdiction of the Copyright Tribunal; and
  - creating certainty for copyright users.

CONCLUSION

There is often much critical comment in the government and public policy arena about how our laws lag behind technological advancement. This concern is often expressed about how such a situation renders the law irrelevant. It is a criticism that is not only familiar to the copyright area, it is often levelled at laws surrounding scientific advancement.

CAL’s view is that a public policy approach based on all relevant information provides the best outcome – even if that means a temporary lag between technology and the law.

This relates to the questions raised in the Issues Paper insofar as the paper seeks policy solutions to challenges of the digital age.
The Issues Paper refers to some aspects of new technology and how it provides greater access for users, but leaves them contravening existing legal provisions. But that is only one half of the ledger.

What we do not know is how new technology will develop and be used by creators and users alike to strike a balance by developing sustainable new products and services for consumers of creative works. We do not know if emerging markets around digital rights management technology that protects creators’ rights are economically viable. Such an industry could become a substantial business sector contributing significant benefits to the economy, to online trade, and to Australian culture.

Indeed, there is much we do not know. That is why CAL strongly supports a modernising renovation of the existing fair dealing system with regular reviews to keep pace with technological, legal and social developments. These developments can then be best responded to through the range of mechanisms now available: statutory licences, other licences, Digital Rights Management, the free market, contracts, and exceptions.

And this, in turn, will continue to encourage distinctly Australian creative output which expresses and enriches our culture and is competitive in the international digital age.

To this end, CAL supports the retention of the fair dealing provisions with some amendments as outlined in this submission.

To do otherwise would be to make significant change based on what we do not know rather than allow developing technology, content markets and practices to inform an evolutionary process.

Let’s get it right gradually, rather than wrong immediately. After all, the digital age has only just begun.
Introduction

1. The Copyright Agency Limited (CAL) is a copyright collecting society that manages, on a non-exclusive basis, the copyright controlled or represented by its members - currently over 24,000 Australian authors and publishers. CAL also represents thousands of other copyright owners through reciprocal agreements with foreign collecting societies.

2. CAL is a not for profit company limited by guarantee.

3. CAL has been declared by the Attorney-General to be the collecting society for the reproduction and communication of works by educational institutions under Part VB of the Copyright Act 1968 (the Act). CAL has also been declared by the Copyright Tribunal to be the collecting society for government copying for the purposes of Part 2 of Division VII of the Act.

4. Pursuant to these declarations, CAL administers statutory licences through which educational institutions and Commonwealth, State and Territory governments remunerate copyright owners for the copying and communication of their works.

5. In addition, CAL offers voluntary licences to the public and corporations for the right to copy and communicate published works. As a single resource, CAL can provide copyright clearances for one or hundreds of thousands of books, articles and artistic works through its licence schemes.

Objectives of the Review and CAL’s Position

6. The government’s expressed objective in undertaking this review is to consider options for maintaining a copyright balance. In CAL’s view both flexibility and certainty are critical to achieving and maintaining the copyright balance. The objectives CAL seeks to achieve for its member creators, clients and the public from all copyright reform is the optimum balance of flexibility, responsiveness and clarity/comporative certainty.

7. Although various reform options are canvassed in the Issues Paper, CAL’s preferred approach is to maintain the current fair dealing and statutory licence framework, but to make changes to that framework, to make it both more certain and more flexible. The essence of CAL’s proposal is to restore the test of fairness to each of the fair dealing and library exceptions.

8. In addition, CAL proposes initiatives that will encourage market development.
These include increased powers for the Copyright Tribunal, encouraging the development of industry guidelines, and providing certainty for copyright users.

Background to Exceptions in Australia

9. The Issues Paper distinguishes exceptions and partial exemptions. Exceptions are described as full exemptions to the copyright owner’s exclusive rights, permitting unremunerated and unauthorised copying. ‘Partial exemptions’ include the remunerated statutory schemes. Occasionally the paper refers to limitations.

10. CAL emphasises that all exceptions, partial exceptions and limitations to copyright in Australian copyright law, including fair dealing exceptions, library copying provisions and statutory licences are all copyright exceptions and each of them must comply with the Three-Step Test contained in the Berne Convention, and confirmed in the World Intellectual Property Organisation (WIPO) Copyright Treaty and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

11. As Sam Ricketson explains in his 2002 report the Three-Step Test prescribes a series of tests which must be met for an exception to copyright to be permissible. Both remunerated and unremunerated exceptions, must be assessed against the Three-Step Test.

12. The fair dealing and library copying exceptions in the Act are presently unremunerated exceptions. There is nothing in the Act or international treaties which requires this.

13. A means of ensuring that unremunerated exceptions continue to be a valid part of the copyright balance, is to require that the uses permitted by those exceptions meet a fairness test – such as fair dealing or fair use. For example, in Australia s40(2) of the Act sets out a number of factors against which a particular dealing can be assessed to identify if the particular dealing in question is fair.

14. CAL’s key issue with the current scope of the fair dealing exceptions is that the deeming provision in s40(3) excludes any assessment of the fairness of some uses of copyright material, regardless of the identity of the consumer or the commercial nature of the dealing. Because of s40(3) it is possible for corporations to rely on the fair dealing provisions. CAL and copyright owners can only challenge that reliance on the basis that the purpose of the use is not for research or study.

---

1 The Three-Step Test, deemed quantities, libraries and closed exceptions: A study of the Three-Step Test in article 9(2) of the Berne Convention, article 13 of the TRIPS Agreement and article 10 of the WIPO Copyright Treaty, with particular respect to its application to the quantitative test in subsection 40(3) of the fair dealing provisions, library and educational copying, the library provisions generally and proposals for an open fair dealing exception, Sam Ricketson (2002, Centre for Copyright Studies). This is available from the following web address: http://www.copyright.com.au/reports%20&%20papers/CCS0202Berne.pdf
15. Similarly, the structure of the library exceptions means that there is no assessment of the fairness of any particular use of copyright material under the provisions. Therefore, although some uses of copyright material under the provisions are fair and should be permitted there are others that are not. While this may not have been of great consequence when the provisions were introduced into the Act, now that commercial document supply markets have developed include online document supply, the disadvantage to copyright owners legitimate markets is very real.

**Proposed Review of Technological Protection Measures and Anti-Circumvention Measures**

16. CAL is aware that government will be undertaking a separate review of the law relating to technological protection measures and circumvention devices. Therefore, CAL has not addressed this area in this submission. In particular CAL has not addressed the issues surrounding private copying levies, circumvention devices, technological protection measures and their interplay with fair dealing exceptions. CAL looks forward to commenting on these later in the Review.

17. CAL is aware that the Australia-US Free Trade Agreement (AUSTFTA) contemplates a regular review of whether the prohibition on anti-circumvention is adversely impacting on users’ rights. This review will also include the effect of prohibitions on fair dealing and other exceptions.

**Market Based Solutions**

18. CAL acknowledges that important public interests are relevant in determining copyright policy. The public has an interest in obtaining access to original creative works. It is CAL’s view that those public interests are best served by seeking market based solutions.

19. In CAL’s view, copyright policy is a tool to encourage trade in copyright related goods and to encourage market development. Only if market failure or serious inequities in the operation of the market emerge that cannot be resolved through market based approaches should exceptions be legislated.

20. In particular, CAL notes paragraph 2.8 in the Issues Paper which refers to copyright owners’ initial alarmist response to reprography, followed, over time, by the development of markets. CAL contends that digital markets are no different and must be allowed to develop – as was the case with reprography. It is premature to regulate this area before the copyright industry has had time to resolve how copyright goods are to be traded digitally – as it would have been premature to allow unfettered photocopying in the 1970s. Similarly, a blanket ban on such activity would have been inflexible and unrealistic.
21. Means of promoting and encouraging markets to develop include existing mechanisms such as the Copyright Tribunal. The use of such mechanisms ensures that the interests of all parties can be considered and taken into account in determining whether a use is to be remunerated or not, and the rate of payment that should apply. This is discussed further in paragraphs 68-73 and 104-105.

22. Similarly, CAL suggests that the government promote a copyright policy framework that supports industry guidelines and industry collaboration. This is preferable to the imposition of legislation which would prevent the market from developing innovative content reviews. Any amendments should encourage the development of agreed industry guidelines about what use is fair from time to time. Such guidelines offer the benefit of being flexible and able to change with needs and circumstances.

ISSUES 1 – 3: FAIR DEALING AND FAIR USE

Fair dealing provisions: comparative certainty and flexibility

23. The Issues Paper states that one aspect of the purposive fair dealing approach is that it provides certainty in relation to the purposes for which fair dealing uses can be made. In CAL’s view, the fair dealing approach is also flexible.

24. Firstly, flexibility is possible through amendments to the Act by the legislature. This gives interested parties the opportunity to take part in consultative forums and discussion about any potential change to the fair dealing provisions, as well as other proposed legislative amendment which would affect the copyright balance in Australia.

25. Once government, as the representative body of Australians, has been persuaded that there are particular public policy arguments which make it desirable to amend the law – such as the addition of a new purpose for fair dealing – it can enact specific provisions to reflect this. For example, if government is persuaded that an additional fair dealing provision for the purpose of parody should be implemented, it has the ability to do so.

26. Flexibility is also possible, within the legislative framework, because individual instances of fair dealing can be assessed against the fairness factors set out in s40(2). This allows the law to develop in response to changes in the external environment.

27. When further clarification of the operation of the fair dealing provisions is required, the Australian Courts have the authority to interpret them, as in the recent Panel\(^2\) decision where the criticism and review fair dealing exception was considered.

\(^2\) TCN Channel Nine Pty Limited v Network Ten Pty Limited (No 2) [2005] FCAFC 53 (26 May 2005)
28. CAL supports the maintenance of the fair dealing approach in Australia subject to amendments we believe are necessary to ensure the system provides the right balance of certainty, flexibility and responsiveness.

29. Fair dealing provides clarity for emerging markets, and reduces the need to resort to lengthy and costly legal cases to settle questions of whether a particular use is fair or not.

CAL’s views about a fair use system

30. Ricketson has stated his opinion that the fair use system as applied in the US may not meet the requirements of the Three-Step Test.\(^3\) This concern is primarily because fair use is not set for certain specific purposes, but is rather an open-ended exception to copyright owners’ exclusive rights. It can, therefore, be applied in circumstances which undermine the copyright owners’ legitimate economic interests and markets for their works.

31. CAL is concerned that the mechanism for clarification of rights under the US fair use scheme depends on litigation and the facts of a particular case, and not a public policy need. It is often a long and expensive process to obtain clarification of fair use through the courts, and outcomes can be hard to predict.

32. CAL is also concerned that as each case potentially shifts the boundaries of fair use depending on the merits of the particular situation before the courts at the time, that this creates uncertainty for copyright users. CAL and our members want a system which provides for market security and development – and believes this is an outcome desirable for both owners and consumers.

33. CAL would like to emphasise that while Australia entered into a Free Trade Agreement with the United States (AUSFTA) which saw some amendments to Australian copyright law, the changes to Australian copyright law were not as great as some who appeared before and made submissions to the Parliamentary Committees with considering the AUSFTA seem to believe they were. And while Australian copyright law has harmonised with some aspects of US law, there are both basic and significant differences to how the copyright balance is achieved in each jurisdiction.

34. For instance, a critical difference is that the standard of originality for copyright in a work in Australia and the US differs. The sweat of the brow doctrine applies in Australia where it has been explicitly excluded from the US. Such differences affect copyright policy, including copyright exceptions.

\(^3\) Ricketson, op. cit., pp 149 – 153.
35. CAL is of the view that overall our Act provides consumers with greater and more flexible access to copyright works with more confidence and certainty than consumers in the US enjoy. An example is the statutory licence for education which is valued by all.

ISSUES 4-7: Private Copying and Related Issues

Time and Format Shifting

36. The time and format shifting exceptions discussed in Chapters 11 and 12 of the Issues Paper have limited application and are difficult to interpret - in fact they point to the short comings of the fair use system.

37. CAL does not support either a fair dealing exception for time or format shifting or the introduction of a fair use type exception. As stated earlier, CAL believes that exceptions should only be implemented in the event of a market failure.

38. Popular practice may conflict with the law – this does not necessarily mean the law is wrong or needs amendment to meet popular practice. Any shift in public policy, including to copyright law, should take a considered and objective approach which complies with Australia’s treaty obligations, and takes into account the interests of all parties it will affect. In relation to copyright, CAL stresses that the digital environment is young, and that markets must be allowed to develop for trade in digital copyright works – copyright owners must be given the opportunity to provide commercially viable digital products and services.

39. In any event, CAL does not believe that a fair dealing exception to permit time shifting such as the schemes in operation in the UK and New Zealand would suit consumer needs and expectations and still comply with the Three-Step Test and other treaty obligations. For example, many consumers expect to be able to maintain a library of copied works.

40. Format shifting is a relatively new phenomenon for text works – and the ability to format shift rapidly and with near perfect fidelity of copies through digital technology is new to all types of copyright works.

41. Considering the infancy of the technology and rights being discussed, CAL believes that our members should be given time to develop markets and services for trading copyright works in the digital environment.

Back-Up Copying

42. CAL can see no reason to implement further provisions that would allow back-up copies of works. CAL is not aware of problems created by the current back-up copying exceptions for our members’ works.
43. CAL would not support an exception to permit the making of back-up copies to ensure that consumers could use the back-up copies if the original were destroyed.

44. If a good is faulty, there are remedies available to consumers under fair trading and trade practices law. If a good has been damaged through the owner’s own misuse of it, accidental loss or normal wear and tear, CAL can see no compelling reason why, because it can be reproduced easily and to a high standard, it should be treated differently from any other consumer good. If a consumer destroys any tangible good, and wants the benefit of that good, they may buy a replacement.

ISSUES 8-10: Other Exceptions, Statutory Licences and other reform issues.

Issue 8 – Other Exceptions and Statutory Licences

Fair Dealing for Research and Study – not for commercial purposes.

45. CAL notes the suggestion made by the Australian Law Reform Commission that the Act be amended to clarify that copying for the purpose of commercial research and development is included under the s40 fair dealing exception for research and study discussed in paragraph 5.14 of the Issues Paper.

46. CAL and its members oppose any such amendment.

47. CAL does not see any public policy argument for including such copying as a fair dealing exception. In fact, in 2003 UK law was amended to exclude any copying for research or private study which is carried out for commercial purposes from the operation of research and study fair dealing exceptions. Corporations wanting to use these works now have to take out a collective licence with CAL’s UK counterpart, the Copyright Licensing Agency Ltd, or get permission direct from the copyright owner.4

48. Research conducted by corporations, for their commercial purposes has as its objective a financial return to that commercial organisation. It is inequitable in these circumstances to suggest that such research can be conducted by requiring authors and publishers to subsidise corporations.

49. As noted in the Australian Publishers Association submission to the Digital Agenda Review:

4 The UK’s Copyright Management Organisation, the Copyright Licensing Agency has detail on the adoption of the amended provisions to exclude copying undertaken for commercial purposes from the UK’s fair dealing provisions: http://www.cla.co.uk/copyright/newcopyrightlaw.html
Corporations have access to works through purchase of digital or printed copies; direct licences from publishers or the blanket licences developed by Copyright Agency Limited. This system of sales and licences constitutes the “normal exploitation of the work”. We see no justification for commercial enterprises to feed at the public trough by acquiring works from public libraries through the section 50 network and avoiding any purchase price of licence payment.

The same considerations apply to both the library exceptions and the fair dealing for research and study exception.

50. There are existing markets that would be affected by such a change. In particular we draw attention to both the current primary market of copyright owners in relation to sales of works into corporations and to the availability of CAL’s licences, which permit copying for commercial purposes of our members’ works by pharmaceutical and other corporations.

51. If commercial research were to be expressly permitted in the fair dealing provisions, that together with s40(3) would mean that no assessment of whether the use was fair, such as the impact on the existing market, would be possible even when multiple copies of articles or chapters of books were made by corporations.

52. CAL therefore advocates the express exclusion of copying undertaken for research and development for any commercial purpose from the operation of fair dealing exceptions, as in the UK.

53. An alternative would be to remove the deeming provision in s40(3), so that all dealings with copyright works by commercial users would be subject to the tests set out in s40(2).

Possible fair dealing purpose of parody

54. CAL supports the inclusion in the fair dealing provisions of the Act of an additional purpose of parody. CAL considers parody to cover copyright uses which occur when the parody refers to the previous work in order to comment on the original work, and does not merely trade on the original work’s value.

55. To elaborate, CAL would not consider a use of an earlier work’s form simply to construct a comic new work a parody – there would need to be use of the form to comment on the earlier work to justify the use as a fair dealing. If the creator of the new work simply wants to create a comic new work, this would not be a parody.
56. Australia could look to the development of exceptions in other jurisdictions to cover parody for elements which need to be present for a work to be considered a parody.⁵

Orphan works

57. CAL understands from libraries that there is a significant problem with orphan works. CAL is convinced that there would be a significant public benefit if there were a mechanism through which copyright uses could be made of an orphan work.

58. However, CAL is concerned to preserve the rights of the copyright owners in those supposed orphan works should they later emerge, and also to prevent any requirement that copyright owners must assert rights in their works, and if not the work could be presumed to be an orphan work.

59. CAL’s preference would be to accommodate this need through a licensing system which creates certainty for copyright users. CAL’s proposal for such a system is set out in this submission in paragraphs 68 - 73.

60. If a licensing system is not considered appropriate, or is not available for the desired use (eg) publication or translation then CAL would support the proposal by the Australian Copyright Council (the ACC) for possible mechanisms to achieve this objective.

61. CAL agrees that in this context the Canadian model discussed in the ACC’s submission provides a useful approach for consideration.

62. CAL considers that any such use of works should require the payment of a licence fee.

63. CAL would be concerned about any proposal which would see Australia adopting for any purpose a registration system which places a burden on copyright owners to assert their copyright interests. Such a move is contrary to international treatment of copyright and treaty obligations.⁶

⁵ For example, Campbell v Acuff-Rose Music 510 U.S. 517 (1994) and Suntrust v Houghton Mifflin 268 F.3d 1257 (11. th. Cir. 2001), which both cover elements necessary for US courts to find parody a fair use.

⁶ Such as Article 5 of the Berne Convention which stipulates that enjoyment of rights “shall not subject to any formality”.

Copyng for External Students - section 40(1A)

64. The intention of s40(1A) and (1B) and reg25B(1)(h) is that individual acts of fair dealing on behalf of external students are permissible in a way analogous to copying which a student can do for himself or herself in the university library. Lecture notes are specifically excluded and intended to be included in s135ZML, with reg25B(1)(h) taking into account any special circumstances.

65. However, educational institutions, and in particular universities, have argued that the scope of this fair dealing includes the supply of the coursepacks to external students.

66. It is CAL's view that the deeming provision of s40(3) applies only when the purpose is established and that the deeming provision of s40(3) would not apply to the highly systematic nature of copying for external students that is taking place in Australian universities. See American Geophysical Union v Texaco Inc (1994) 27 IPR 381.

67. CAL suggests that there are two options for reform. Firstly, s40(1A) could be amended to clarify that it does not include the systematic copying by educational institutions for their external students. An alternative is that s40(3) is expressed not to apply to s40(1A) so that the fairness and market impact of the dealing can be assessed.

Issue 9 – Other Options for Reform

Certainty for Copyright Users

68. To provide certainty for copyright users that the works they are copying are included in a copyright licence scheme, and to reduce their administrative costs in managing copyright licences, CAL suggests that the government consider incorporating a system into the Act to allow those copyright users to assume that the works they are using are included in a collective licence agreement.

69. The underlying thinking for this proposal is that if a significant proportion of copyright owners in a particular class of works agree to participate in a collective management scheme, then that scheme would be consistent with the expectations of other copyright owners in that particular class. An opt out mechanism for copyright owners that did not want their works included in the licence scheme could be provided.

70. The proposal could operate in a number of ways. Firstly, by a specific provision providing that the copyright user could assume that a work was included in a collective licence scheme unless told otherwise.

71. Another option could be to limit the damages payable by a collecting society to a non-member copyright owner for authorising copying of their works under a
collective licence to the licence fees that would otherwise have been payable for the copying. The limitation would only apply if the work were in the same class of works as the works actually licensed by the collecting society.

72. A further alternative is if a collecting society wanted the scope and terms of any licence scheme to be extended in this way that they could refer the licence scheme to the Copyright Tribunal to review. The Tribunal could then hear evidence, advertise the reference, vary the licence scheme if necessary and decide whether to grant the exception. This would provide an impartial forum for assessing the merits of any particular situation.

73. Schemes with similar objectives operate in the UK and Canada and would provide useful examples for such a scheme to be adopted into Australia.

**Copying Undertaken for the Print Disabled**

74. New technologies offer great benefits in increasing the access to works by the print disabled. A licence scheme to provide materials in formats appropriate for the print disabled is contained Division 4 of Part VB of the Act. This licence is administered by CAL.

75. CAL is aware that the licence does not meet all of the print disabled community’s desires for digital access to works in alternative formats which are not commercially available from publishers. CAL is working with this community to try to develop additional means for them to access these works, and at the same time meet the legitimate concerns of publishers about the security of their works in the digital environment.

76. CAL has engaged the Australian Copyright Council to undertake research into the operation of the licence scheme, and to develop guidelines for the provision of works to this part of the community in formats that will maximise this section of the community’s ability to access works.

77. The Copyright Council is undertaking research into provisions which exist to assist the print disabled in other jurisdictions, including the US, and is due to report to CAL in the next few months on the progress of this project. CAL believes this will be beneficial to considering any amendments to Australian law in this area, and as stated earlier in our submission would prefer that the copyright industry, consulting with the print disabled, develop guidelines which address these concerns.

**Quantitative Tests**

78. CAL has concerns with two quantitative tests in the Act – one included in the statutory licence for education (s135ZG and s135ZMB), the other in the fair dealing exception for research and study (s40(3)).
It is CAL’s view that to include quantitative tests in exceptions is inconsistent with fairness. A quantitative test approach also limits the flexibility of the exception to cope with changing circumstances, as explained in previous submissions made by CAL on s135ZG and s135ZMB.

Deeming an exception for a particular quantity of a work as fair, without any assessment of the circumstances of the dealing, also encourages users to apply exceptions to systematically copy works.

Finally, the amount of the work deemed to fall under a copyright free exception in these provisions conflicts with amounts of the works which are now offered for sale by copyright owners, their licensees, or agents to users through document delivery services and CAL licences.

**Quantitative Tests - Sections 135ZG and 135ZMB**

Section 135ZG and its digital equivalent s135ZMB of the Act are based on a recommendation made by the Copyright Law Committee on Reprographic Reproduction (Franki Committee) in its 1976 report. It is important to note that this recommendation relied on two key assumptions:

- that the amount of copying of this nature would be very limited; and
- that it would be difficult for copyright owners to collect remuneration for the copying.

These assumptions are understandable given the context at the time. Critically, there was no data available to the Franki Committee in relation to the volume and type of educational copying, there was no means of administering copyright, there was no educational statutory licence, and the photocopier was still a new technology.

However, developments since 1974 mean that these assumptions do not apply today. Some of the features that have changed since 1974 include:

- the introduction of the educational statutory licence;
- the fact that extensive information about the volume and character of copying in educational institutions is now available, showing that this copying is significant in volume; and
- CAL has been monitoring copying in the educational sector since 1988.

The success of CAL shows that it is not difficult for copyright owners to collect equitable remuneration for this type of copying.
86. In addition, educational practices have changed and educational publishing has also changed and developed to meet these changes. There is concern in relation to the effects of these exceptions on the markets for artistic works, as they permit copying of 100% of an artistic work where it appears with text. This is of particular concern in the digital environment where free copying of 1% of a work under s135ZMB combined with its extension into the digital environment under s135ZMG can result to the copying of digital supply of many valuable artistic works which is not remunerated. CAL therefore considers these sections should be repealed.

87. CAL is of the view that there is no policy reason for s135ZG to continue to exist and no justification for its extension into the electronic environment in s135ZMB.

88. CAL therefore proposes the repeal of s135ZG and s135ZMB. Educational institutions should rely on the payable statutory licence exceptions for this copying and communication. This would not restrict access by educational institutions to valuable works, and if they felt that this usage was indeed insubstantial, they could ask the Copyright Tribunal to assess the rate of equitable remuneration payable for such limited quantities.

Quantitative Tests – section 40(3)

89. CAL has made its view about the continued existence of s40(3) known to government on several occasions. CAL’s main concern with the provision is that although undoubtedly many fair dealings with copyright works are made under s40, the existence of s40(3) means that many other uses of copyright works which would not be fair dealings are also permitted.

90. The objective of s40(3) was to give legitimate users of copyright material the assurance that their uses of copyright material were permitted. However it is a blunt instrument. Its removal will not change the legitimate scope of fair dealing for research or study. CAL suggests that an alternative means of achieving certainty for legitimate users could be the development of industry guidelines, or amending s40(3) to be a presumption not a provision which deems there to be fairness in practices by consumers which may not really be fair.

Library provisions

91. CAL is of the view that the scope of the library provisions in the Copyright Act requires urgent review. We have put this view to government on several occasions. Again, CAL’s concern is that there is no fairness test against which any claimed reliance on the library provisions can be assessed, and consequently many uses of copyright material that should not be considered fair take place in reliance on the library provisions.

92. The library exceptions have substantially affected the commercial market for copyright owners’ works, as Australian libraries have utilised these exceptions on a cost recovery basis to distribute works into the private sector. Further, many
corporations have used the existence of the library exceptions as a means of gaining free access to copyright works for their commercial purposes.

93. The impact of the library exceptions on owners’ markets raises concerns as to Australia’s compliance with the Three-Step Test in the Berne Convention. The conclusion reached by Ricketson\(^7\) is that there are serious flaws in the structure of the library copying provisions, which means that s49 and s50, in particular, do not meet the requirements of the Three-Step Test.

94. Reasons advanced for the scope of the library copying exceptions have included:

- the poor quality of the copies made;

- the practical difficulties in monitoring the copying under the provisions; and

- the assumption that the copying was incidental, and did not cause financial harm to copyright owners.

95. In CAL’s view, it may have been the case that in 1968 that the poor quality of the copies made under the provisions meant that the copies were not competing with copyright owners’ market for originals. However, given the technological improvements over the past decades, the speed and quality of the copies now being made does indeed impact on the copyright owners’ markets for their works. This is particularly the case with digital reproductions.

96. In respect of the argument that the copying was difficult to monitor, the growth of copyright collecting societies means that it is possible to monitor, and collect fair payment for copyright owners also for these uses; and to remunerate copyright owners in an efficient manner.

97. Again, particularly given the development of document delivery services, it is impossible to maintain that the use of copyright material under these provisions is incidental and does not financially harm the copyright owner.

98. Document delivery services are offered by many libraries, including corporate, university, state and national libraries. The Australian Library and Information Association (ALIA) has developed recommended charges for document delivery services provided by libraries which vary between $9.90 and $39.60 depending on the turn-around time requested.\(^8\) Libraries offering document delivery services charge rates often higher than those suggested by ALIA, and as they undertake this copying claiming reliance on the library copying provisions, no component of the fee is paid to copyright owners. CAL contends that this systematised and mass copying with no remuneration to copyright owners is inequitable and the provisions of the Act relating to it should be revised.

\(^7\) Ricketson, op. cit. pp. 101-145.
\(^8\) http://www.alia.org.au/interlibrary.lending/ilrs.code.html
99. CAL’s proposal is that Australia's library exceptions be amended to bring them in line with other comparable jurisdictions, namely the UK, Canada and the US. On this issue the report *A comparative study of library provisions from photocopying to digital communication* Research paper prepared for the Centre for Copyright Studies Ltd by the Australian Copyright Council in May 2001 is relevant.

100. This report concluded that Australia’s library copying exceptions were out of step with those of the UK, the US and Canada – providing much broader application of library copying exceptions here in Australia. The report concluded that were Australia to adopt provisions more akin to those in the UK, the US and Canada, Australian copyright law would be more likely to be consistent with the Three-Step Test.9

101. CAL proposes that either libraries in commercial organisations be excluded from reliance on the library provisions or that a fair dealing test, such as that in s40(2) be incorporated into the library copying provisions.

**Preservation copying of rare books for libraries**

102. CAL notes that certain libraries in the corporate sector hold collections, which are valuable either as part of the historical record or because the information they contain is not available elsewhere.

103. As outlined in previous submissions made by CAL (see for example CAL’s 30 September 2003 submission to the Digital Agenda Review)10, CAL would support limited exceptions for corporate libraries in respect of valuable works. These might include, certain limited exceptions relating to preservation, and loans of works not available in public sector libraries.

**Extension of the power of the Copyright Tribunal**

104. CAL notes that an uncontroversial recommendation of the 2000 Copyright Law Review Committee Report *Jurisdiction and Procedures of the Copyright Tribunal* was to extend the Copyright Tribunal’s jurisdiction to cover all collective management licences.

105. In CAL’s view action on this recommendation is urgently required.

---
