4 July 2018

The Director, Copyright Law Section
Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601

By email: copyright.consultation@communications.gov.au

Dear Director

Copyright Modernisation Consultation

Thank you for the opportunity to provide comments on the Copyright Modernisation Consultation. Queensland Law Society appreciates being consulted on this important issue.

The Queensland Law Society (QLS) is the peak professional body for the State’s legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. The QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This enclosed response has been compiled with the assistance of the QLS Technology and Intellectual Property Law Committee, whose members have substantial expertise in this area.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Vanessa Krulin by phone on (07) 3842 5872 or by email to v.krulin@qls.com.au.

Yours faithfully

Ken Taylor
President
Copyright Modernisation Consultation

1. **Background**

On 18 August 2015, the then Treasurer Joseph Hockey, requested the Productivity Commission (“the Commission”) to undertake an inquiry pursuant to the Productivity Commission Act 1998 into Australia’s intellectual property ("IP") arrangements.

On 23 September 2016, the Commission submitted to the Government its final report ("the PC Final Report") and on 20 December 2016, the Final Report on its "Inquiry into Australia’s Intellectual Property (IP) Arrangements" was tabled in Parliament.

The Australian Government published its response to the PC Final Report in August 2017 (the "Government Response"). There has already been considerable progress in conducting consultations with interested parties and implementing the Government’s responses to some of the Commission’s recommendations.

The PC Final Report considered whether the current IP arrangements provided an appropriate balance between access to ideas and products, and encouraging innovation, investment and the production of works.

The Department of Communications and the Arts (the "Department") in August 2017 announced the following 12-month timeline for copyright reform:

- In the second half of 2017, the Department announced there would be:
  - Continued consideration of the copyright safe harbour scheme.
  - The review of the Copyright Regulations and the Copyright Tribunal Regulations.
  - A review of the Copyright Collecting Societies’ Code of Conduct.
  - Consultation with the Australian book industry to ensure the regulatory framework does not unnecessarily restrict competition within the industry.

- In the first half of 2018, the Department said it will hold public consultations on options for reforming the Copyright Act in relation to:
  - Flexible exceptions.
  - Use of orphan works.
  - The extent to which licence terms prevent the exercise of copyright exceptions.

The Government supported certain recommendations in the PC Final Report which it considered were aimed at providing fairer access to materials whilst also taking into account copyright protection as a means to encourage innovation.

On 19 March 2018 the Department released a paper to assist with the consultations and sought views on:

- **Flexible exceptions** – which need to adapt over time to provide access to copyright material in special cases as they emerge;
- **Access to orphan works** – which exist when copyright owners can’t be found and users lose access to copyright materials, and
- **Contracting out of exceptions** – which can reduce access to copyright material for users.

The Department has extended the invitation for submissions to 5.00 pm AEST on Monday 4 July 2018.
2. **Flexible Exceptions – A general fair use exception**

**Recommendation 6.1**
The Australian Government should accept and implement the Australian Law Reform Commission's final recommendations regarding a fair use exception in Australia.

**Commissions Notes/Final Recommendations:**
The Commission considered that: "Australia's narrow purpose-based exceptions should be replaced with a principles-based, fair use exception, similar to the well-established system operating in the US and other countries".1

The recommendation of the Commission is couched in similar terms to the Australian Law Reform Commission's ("ALRC") recommendation. The ALRC recommended a fair use exception with a non-exhaustive list of four fairness factors to be considered in assessing whether use of another's copyright material is fair and a non-exhaustive list of eleven illustrative purposes.2

The ALRC considered that the structure and interpretation of section 107 of the United States Copyright Act 1976 provided an appropriate model for an Australian fair use exception in providing a broad, flexible standard based on fairness factors.3

The fairness factors recommended by the ALRC were:

- The purpose and character of the use.4
- The nature of the copyright material.5
- The amount and substantiality of the part used.6
- The effect of the use upon the potential market for, or value of, the copyright material.7

The non-exhaustive list of illustrative purposes recommended by the ALRC included four current purpose-based exceptions and also non-currently identified exceptions. The illustrative purposes recommended by the ALRC were:

- Research or study;
- Criticism or review;
- Parody or satire;
- Reporting news;
- Professional advice;
- Quotation;
- Non-commercial private use;
- Incidental or technical use;
- Library or archive use;

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1 The PC Final Report p.9.
3 Ibid.
4 ALRC Report p.129 at [5.28].
5 ALRC Report p. 135 at [5.68].
6 ALRC Report p.137 at [5.68].
7 ALRC Report p.138 at [5.77].
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- Education; and
- Access for people with disability.

Government's Response:
The Government noted this recommendation and will further consult.

Comments:
The purpose of copyright law?
The purpose of copyright law is twofold: 8
a) To promote and incentivise the making of creative works by granting an exclusive right to the author to licence, sell, or otherwise deal with the copyright; and

b) To ensure that the monopoly created by copyright laws is not abused. In this sense, access to protected works for the 'public good' is an important feature of copyright laws.

The current copyright regime
The Government's aim is to create a modernised copyright exceptions mechanism to keep up with technological advances and flexibility to adapt to future changes. Considering this objective, it is important to investigate the current copyright regime to determine whether the current ‘fair dealing’ exceptions to copyright infringement are reasonable. 9
Briefly, as stated above, the current ‘fair dealing’ exceptions cover: review or criticism, parody or satire, research or study, news-reporting, judicial proceedings or professional legal advice.
Importantly, the ‘fair dealing’ exceptions are a purpose-based regime. It is inherent in that regime that the exceptions are restrictive, as the defences are limited to specifically identified conduct. Although it may be said that artists are unable to take inspiration from older works to create new works, “inspiration” can often be an artistic disguise for “copying”.

Should we experiment with ‘fair use’ work in Australia?
QLS considers that the Commission and the ALRC place an unrealistic expectation on the simplicity of introducing the “fair use” defence in Australia, for example, the expectation of the usefulness of U.S. jurisprudence. Relevantly, the ALRC states:

“Australian courts, copyright owners and users would be able to have regard to extensive US jurisprudence…”10

However, in respect of the first fairness factor, ‘the purpose and character of the use’, U.S. law appears to have a lack of consensus as to the relevant test, namely whether the test is that

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9 This submission only considers the main copyright exceptions, i.e. ‘fair dealing’.
10 ALRC Report p.128 [5.21]
the Court should look at the transformative use doctrine as opposed to a market-centred consideration. The ALRC Report noted:

"Some commentators have suggested that US jurisprudence on transformative use is not altogether coherent. However, others have found the trend in US court decisions much more consistent. Professor Neil Weinstock Netanel's review of several empirical studies and his own analysis of US case law led him to conclude that, since 2005, 'the transformative use paradigm has come to dominate fair use case law and the market-centered paradigm has largely receded into the pages of history'." (Citations omitted)\(^1\)

In addition, the US Supreme Court in 1994, in *Campbell v Acuff-Rose* (*Campbell*), applied a transformative test as the determining factor:

"Although such transformative use is not absolutely necessary for a finding of fair use, ... the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright ... and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."\(^2\)

Whilst the ALRC considers U.S. jurisprudence will be of assistance to Australian Courts, the ALRC also considered, unlike the tension in the U.S. law on the point, that 'transformativeness' should not be considered determinative, but should be weighed along with other relevant matters. The point being that introducing a general "fair use" exception will also introduce greater uncertainty for several years until Australian Courts have developed their own reasoning on the application of the defence.

Where the U.S. courts now appear, on one view, to consider transformative use as the appropriate test for the first fairness factor, the case for introducing a stand-alone transformative use exception in Australia, however, has been considered and rejected.\(^3\)

The four fairness factors are essentially taken from the current fair dealing provisions. What the "fair use" exception seeks to do is to introduce them as guidelines but open the defence up for any activity which will then be examined on a case by case basis, applying the four fairness factors informed by the illustrative purposes. In addition neither the factors nor the purposes are closed classes and so other factors and illustrative purposes conceivably could be added.

It is respectfully submitted that this is a recipe for a very loose and confusing arrangement leading to the real possibility of difficult to reconcile applications of the defence. This is principally because the non-exclusive factors and illustrations are wider than the present activity based exceptions and are untested. There is greater capacity, therefore, to argue the benefit of the defence when the potential uses will be much broader under the proposed new exception.

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\(^1\) ALRC Report p.131 [5.37].
\(^2\) ALRC Report p.131 [5.36].
QLS recommendation

QLS considers that the prudent course the Government should adopt at this time is to mimic what it has done regarding the extension of the safe harbor protection. That is, that the Government does not introduce a completely different and wider approach to the fair dealings exceptions, but rather examine, with consultation, which sectors may justify a further discrete recognition of their need for a defence and extend the defence to those sectors.

Thus the QLS submission is that:

- The Government take small, incremental steps which have solid justification and are worthy of the extended protection as a fair dealing.
- The alternative, using the safe harbor analogy where ecommerce spokespersons lobbied for the extension to all online services of opening up a general defence, will invite chaos rather than an orderly extension to those worthy recipients.

3. Access to Orphan Works

Recommendation 6.2

The Australian Government should enact the Australian Law Reform Commission recommendations to limit liability for the use of orphan works, where a user has undertaken a diligent search to locate the relevant rights holder.

Commissions Notes/ Final Recommendations:

The Commission recommends creating flexible exceptions (i.e. ‘fair-use’) to help create access to works that have become orphaned. Further, the Commission recommends that liability should be limited in circumstances where the user has shown due diligence in locating the copyright holder.

Government’s Response:

The Government supports this recommendation. The Government is to consult on the most appropriate way to limit liability.

Comments:

Is orphan works an issue? To what extent/why?

An ‘orphan work’ is a work that is protected by copyright but whose owner cannot be identified or located. This issue is considerably pertinent to Australia since users cannot rely on ‘fair use’, but instead must rely on a limited number of exclusions. In order to combat this issue, a new exception was introduced under AUSFTA to allow use of works for certain non-commercial purposes. ‘Orphan works’ still pose a major problem for many institutions, such as libraries and archives. To appreciate the extent of works being orphaned, consider the results of a study noted in a British Library, which estimated that a considerable proportion of

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15 Ibid 287.
16 Copyright Act 1968 (Cth) s 200AB.
all works it knows about are orphans, or in excess of 50 million orphan works across the public sector. 17

The way forward?

It is paramount that diligence be confined and subject to an objective test to ensure that 'orphans' are not being abused. QLS recommends that the Government consider a defence to the use of orphan works which is already in use by the Courts in respect of infringement and which places the risk of not making reasonable inquiries to ascertain the copyright owner upon the user.

QLS refers to section 115(3) of the Copyright Act 1968 (Cth) – the defence of innocent infringement. In respect of this defence the Court scrutinises the conduct of the infringer and determines objectively whether they may in fact rely upon the defence. The examination necessarily includes the Court considering whether the infringer was aware of the copyright ownership, which introduces the Court to an objective examination of the awareness or deemed awareness of the infringer of the identity of the owner. Further, the Court considers not only whether the infringer knew the identity of the owner but also whether the circumstances established that the infringer could have ascertained the owner by reasonable inquiry.

In such a case the infringer who succeeds with the defence is exposed to an account of profits and not a claim for damages.

In making this submission, QLS has considered the numerous First Nation artists and authors who would not be linked to a library, art gallery or some forum where they could be easily found, yet are known to people in their geographic location. It is further submitted that libraries and universities would be able to avail themselves of the defence as their purposes would largely not be commercial, thereby not yielding any profit to account.