

# **T**he first of the copyright reforms

*CU examines Part 1 of the Copyright Law Review Committee's Report on the Simplification of the Copyright Act 1968, Exceptions to the Exclusive Rights of Copyright Owners 1, released in mid-September*

**T**he Copyright Law Review Committee (CLRC) was directed under paragraph 1(a) of its Reference to consider changes to the *Copyright Act 1968* to enable it to be understood by those who require an understanding of their rights and obligations under the Act, including simplification of the schemes and provisions to exclusive rights. Part 2 of the Report is expected to be released in the near future. It will deal with the remainder of the CLRC's Reference to review the Act - a consideration of rights of copyright owners, categorisation of protected subject matter, and issues identified in an earlier report made by the Copyright Convergence Group.

In Part 1, the CLRC makes recommendations in relation to fair dealing; copying by libraries, archives, and educational institutions; copying for people with disabilities; and a number of miscellaneous matters.

## **Fair dealing**

Currently, the Act makes a number of exceptions to the rights of copyright owners which enable non-infringing uses to be made of copyright material. Perhaps the most important is the "fair dealing" exception which permits uses for four purposes only:

- research or study;
- criticism or review;
- reporting of news;
- professional advice given by a legal practitioner or patent attorney.

The CLRC proposes a revised fair dealing provision with the aim of simplification and to allow for the application of a fair dealing principle in the digital environment.

It concluded that a general principle applicable to all subject matter would be less likely to need constant revision. The CLRC acknowledged the influence of the U.S.' "fair use" doctrine on its recommendation but noted that it would expect Australian courts to develop laws appropriate to local conditions.

The majority proposal includes the following recommendations:

- that the current provisions be amalgamated into a single provision;
- an expansion of fair dealing to an open-ended model that will specifically refer to, but not be limited to the current exclusive set of purposes;
- in determining whether in any particular case a dealing is a fair dealing, regard shall be had to the following non-exhaustive factors: the purpose and the character of the dealing; the nature of the copyright material; the possibility of obtaining the copy-

right material within a reasonable time at an ordinary commercial price; the effect of the dealing upon the potential market for, or value of, the copyright material; and in a case where part only of the copyright material is dealt with - the amount and substantiality of the part dealt with, considered in relation to the whole of the copyright material;

- removal of fair dealing provisions that relate specifically to external students;
- removal of provisions that require sufficient acknowledgment in relation to fair dealing for the purpose of reporting news, on the basis that proposed moral rights provisions will deal with this issue.

It further proposes a new quantitative test that will be limited in operation to published literary, dramatic, and musical works, or adaptations of such works in printed form. The current quantitative test, s40(3), applies to dealings "by way of copying" with published literary, dramatic and musical works for the purpose of research or study. It provides that dealings with works or adaptations, other than articles in periodicals, to be fair if a "reasonable portion" is copied. "Reasonable portion" is defined elsewhere in the Act to be 10 per cent of the pages in an edition of not less than 10 pages, or the whole or part of a single chapter of such an edition. But a dealing by way of copying may be regarded as a fair dealing under the non-exclusive s40(2) factors, even if it fails the quantitative test.

The new test will stand alone from the new fair dealing provision as a single deemed exception, and will be defined exhaustively by reference to a "prescribed portion" that will reflect

the limits currently used with respect to a "reasonable portion" in the Act (s(10)2). The CLRC noted the difficulty of applying a quantitative test in the digital environment, particularly noting the difficulty of determining a suitable unit of measurement, problems with large databases, lack of distinction between works, and the lack of certainty with which such a test could be applied to subject matter other than published literary, musical or dramatic works, such as computer games.

The majority also recommends that the test apply to all dealings with printed published literary, dramatic, and musical works for the permitted purposes.

The majority justifies these recommendations as continuing to build on existing jurisprudence; for consistency with Australia's international obligations; as striking a fair balance between users and owners in a manner that maximises the public interest; offering greater flexibility to the courts when dealing with new technologies; providing greater certainty in determination of "fairness"; and by preserving the guidance given by the quantitative test.

The majority recommends that the proposed new fair dealing model apply to all exclusive rights subsisting in copyright, including the proposed right of communication to the public, once it is enacted.

The CLRC rejected the restoration of the word "private" before "study" in s40. But it also noted that where an activity is undertaken for a commercial purpose to the economic detriment of the copyright owner, it should be raised as a factor that would weigh against the finding of a fair dealing.

With the exception of one member, the CLRC recommended that all uses of copyright material for the giving of professional legal advice would fall within the fair dealing principle. The dissenting

member felt that "all uses" should not include reproduction or supply of material electronically.

## Copying by libraries and archives

The CLRC examined the need for separate provisions for libraries and archives. It noted that publishers and libraries have different functions and that its recommendations were not intended to place libraries in direct competition with publishers. Therefore, access to materials via libraries and archives should remain limited so as not to interfere with legitimate interest of copyright owners.

The CLRC viewed royalty-free copying by these institutions as an important exception to be maintained in the public interest, but in a simplified form. To this end, a major recommendation is the repeal of s49, which allows for copying on behalf of users, leaving such copying to be governed by the proposed fair dealing and quantitative test provisions. By majority recommendation, the user's purpose will be regarded as the relevant purpose in determining fairness of any dealing made by a library or archive on behalf of a user.

Other recommendations include:

- amendment of the libraries and archived provisions so that copying of the whole or parts of works and subject matter other than works are treated consistently;
- all provisions permitting royalty-free copying by libraries and archives apply to all libraries and archives respectively, whether or not they are conducted for profit;
- removal of references to specific archival bodies in the definition of "archives";
- removal of requirements for declarations to be made by both users and librarians/archivists when libraries and archives make copies;
- repeal of s50, which allows a

library to copy for another library for its collection or a user, with the proposed fair dealing principle to apply in its place (majority recommendation);

- provisions dealing with copying of works and audiovisual items for the purposes of preservation and copying of illustrations accompanying articles and other works to be repealed and the proposed fair dealing principle to be applied;
- amalgamation of provisions dealing with copying by parliamentary libraries;
- extension of s39A, which gives limited immunity from liability for the authorisation of making infringing copies by the display of certain notices, to apply where copyright material in a library/archive collection is made available to users.

## Miscellaneous provisions

The CLRC identified 33 royalty-free exceptions that specify an allowable act with respect to a specific subject matter, recommending that these exceptions be located in one part of the Act and organised in terms of the exclusive rights to which they relate. Provisions the CLRC found could be subsumed under the new fair dealing proposal include exceptions relating to works in public areas, buildings and models of buildings, incidental filming and televising of artistic works, publication of artistic works, artistic works transmitted to subscribers of a diffusion service, and reconstruction of buildings.

## Statutory licences for educational institutions

The CLRC noted that it did not propose substantial changes to these provisions. Its main aim was to simplify the provisions and to ensure technological neutrality. Its primary recommendations are to allow education institutions to use all copyright material in digital form pursuant to a statutory

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licence to pay a royalty, and to repeal the definition of "educational institution".

### Copying for people with disabilities

Copying for "handicapped readers and intellectually handicapped people" should not be merged with the

fair dealing provisions, the CLRC found.

Other recommendations include: the extension of the statutory licence with respect to the making of sound broadcast by print-handicapped licensees to encompass other broadcasts and broadcasters, but only if the sole purpose of the programs is

to communicate with the print disabled: and an expanded definition of "person with a print disability" which includes a reference to literacy. <

**Lucy York**

The report is available from Commonwealth government book shops and at the CLRC's website at <http://www.agps.gov.au/clrc>

## Fair dealing recommendations welcome but worrying

*Fair dealing should be about regulating the use of material to which people can get access, not ensuring access to material, says Libby Baulch, executive officer of the Australian Copyright Council*

**T**he Copyright Law Review Committee (CLRC) report on *Exceptions to the Exclusive Rights of Copyright Owners* includes some welcome recommendations for the simplification of exceptions to infringement in the Copyright Act, but some worrying recommendations for substantive changes. These recommendations relate to the expansion of the exceptions relating to "fair dealing" and copying by libraries.

### A question of balance

In the report which preceded the current *Copyright Act*, the Spicer Committee said:

*The primary end of [copyright law] is to give the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.*<sup>1</sup>

The balance between the rights of copyright owners and the interests of people who use their work is set out in the "three-step test" which now appears in a number of international treaties. Under this test, any exceptions or limitations to copyright owners' rights must:

- be confined to certain special cases;
- not conflict with a normal exploitation of a work; and
- not unreasonably prejudice the legitimate interests of the rights owner.<sup>2</sup>

When reviewing exceptions to copyright, particular regard must be had to means of "normal exploitation" which have developed since the exceptions were introduced. There is little evidence of such analysis in the Committee's report. Instead, there are many references to new means of use of copyright material, and the implications of these for exceptions to copyright infringement. At a recent seminar on the report, one of the Committee members indicated that this analysis

would appear in the Committee's second report, which deals with the rights of copyright owners.<sup>3</sup> The comment highlighted the Committee's odd decision to release a report on exceptions to exclusive rights, based on rights currently granted to copyright owners and the government's April 1998 decision to introduce a new right of communication to the public, before the report reviewing the rights.

It is also clear from the comments by the Chairman of the Committee at the recent seminar that the Committee (or at least the majority) took the view that copyright owners have had it too good for too long, and greater regard now needs to be given to the interests of users of copyright material. This view echoes that of representatives of libraries, who have argued that the scope of copyright law has been expanded too much, and thus the scope of the fair dealing must be expanded to maintain the appropriate balance between copyright owners' rights and access to copyright material.<sup>4</sup> One development that has prompted these claims was the WIPO treaties finalised in December 1996 (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty). These treaties established new international standards for the publication and