

Copyright reforms

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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

The 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.*¹

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.²

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.³ 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.⁴ 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

dissemination of copyright material online. But I would argue that the aim and effect of these new standards is to enable copyright to operate effectively in the digital environment, and thus to achieve its broad aim of encouraging the production and dissemination of creative material. The rights of copyright owners are a means to that end, and the development of rights to ensure that the broad aim is met does not mean that there has been a massive shift in the balance towards copyright owners.

The "open-ended" fair dealing defence

The Committee's recommendation to bring together the fair dealing exceptions, and to remove arbitrary distinctions between the various provisions, is welcome. The recommendation that the purposes for which a fair dealing can be made be open-ended causes concern.

It appears from the Committee's survey of the laws of other countries in its report that most countries have exceptions which deal with specific exceptions, and that the U.S. is the only country which has an open-ended provision. This is not surprising given the international standard that exceptions be limited to "certain special cases" (the U.S. is a relatively recent signatory to the Berne Convention).

It is not clear from the Committee's report what new purposes for fair dealing it had in mind, although it does state its intention that the purpose may be a commercial one.⁵ The development of digital technology has produced new *types* of use (such as browsing, downloading, caching, printing a digital file), but these uses are made for a *purpose* (e.g. browsing for the purpose of research). It is not clear that the development of digital technology has resulted in new purposes of use for which there should be special exceptions.

"Prescribed portion" defence

The proposed new "prescribed portion" defence is based on current provisions which allow the copying of one article from a periodical or a

"reasonable portion" of a work. The "reasonable portion" provisions were based on an assumption that the only means of exploitation to be protected was sales of books and periodicals, and that articles from periodicals and parts of books were not commercially available.

Under the proposed defence, there is no requirement to investigate whether the article or book chapter is commercially available, either in print form or digital form. The only requirement is that the article or book chapter has been published somewhere in a printed periodical or in a printed edition. Thus a library could digitise and transmit to a client an article from a periodical, even though the publisher of the periodical supplies the article in digital form to subscribers to the periodical.

Fair dealing by libraries

The main problem with the Committee's recommendation about fair dealing by libraries is that where a library copies for a client, the criteria for assessing fair dealing would be applied to client's use, rather than the library's use. This means that, for example, the fact that the library had copied the same material for hundreds of clients may not be taken into account in assessing whether making a copy was fair. Similarly, the fact that a licence is offered by a collecting society for library copying may not be taken into account when assessing fairness. The recommendation overlooks the fact that the effect on a copyright owner of an individual making a single copy is different to that of an institution making many copies, and that the making of private copies is more difficult to license than the making of copies by an institution.

Effect of technological devices and contractual obligations

There is no discussion in the report of the relationship between the proposed new fair dealing provision, and technological devices which may be used to "lock" or control the use of digitised material. Countries which are party to the two new WIPO treaties are required to have provisions in their copyright laws

which prohibit circumvention of technological devices aimed at protecting copyright material. Similarly, there is no discussion in the report of the relationship between the fair dealing provisions and contractual obligations between the user and the supplier of digitised material. The issue was raised in the government's discussion paper "Copyright Reform and the Digital Agenda" (June 1997), but there are no references to it in the government's statements about its April 1998 decision to adopt most of the proposals in that discussion paper. In the past, fair dealing has been about regulating the use of material to which people can get access, not ensuring access to material, and that should continue to be the approach. <

Libby Baulch

¹ Report of the Copyright Law Review Committee 1959, at para 13.

² This test appears in the Berne Convention and the TRIPS agreement (Australia is a party to both of these), and in the new WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Australia is likely to accede to the two new treaties.

³ Copyright Society seminar, 29 October 1998.

⁴ See, for example, Sir Anthony Mason, "Development in the Law of Copyright and Public Access to Information", [1997] 11 EIPR 636; response by the Australian Council of Libraries and Information Services to 'Copyright Reform and the Digital Agenda', (1997) 13 ACLIS Copyright Bulletin 9. See also, in relation to the United Kingdom, the Hon Mr Justice Laddie, "Copyright: Overstrength, Over-regulated, Over-rated?", [1996] 5 EIPR 253.

⁵ In its recommendations that library copying be covered by the new fair dealing provision, the Committee refers to purposes covered by the current library copying provisions: copying for a client, copying for another library's client, copying for another library's collection, preservation of manuscripts, and replacement of lost or damaged material.