Who should pay for access to copyrighted material?

Should the literary community be forced to subsidise the provision of works to the public? According to Dianne Speakman, communications manager at the Copyright Agency Limited, adopting recommendations in the CLRC's report might give no other option

The first part of the Copyright Law Review Committee's (CLRC) report on simplifying the *Copyright Act 1968* is complex. Many recommendations are technical or would merely tidy up the Act. But while several key proposals may seem innocuous enough individually, if applied in combination they could financially disadvantage copyright owners.

Fair dealing

Under the Act, works can be copied for free if they comply with fair dealing provisions, which set out the purposes for which works can be copied without obtaining permission from copyright owners.

As well as a general test for fair dealing, the Act currently contains a number of exceptions which automatically define as fair dealing copying for certain defined purposes. These include copying for the purposes of: research and study, criticism or review, reporting news, judicial proceedings, and providing professional legal advice. There are also provisions allowing libraries and archives to undertake free copying on behalf of users and for other libraries.

As set out in s40(2), the list of factors used to assess fair dealing is exclusive; that is, it sets out the only factors to be considered when assessing whether a dealing is fair. One of the CLRC's key recommendations is to make the definition of fair dealing under the Act more open-ended and make this list inclusive.

In other words, the current factors which make copying a "fair dealing" would continue but other, undefined, factors may also be considered. Similarly, exceptions for copying for specific purposes would also be made open-ended, permitting other (as yet undefined) purposes.

Section 40(2) deals with copying for the purposes of research and study. Its deeming provision allows copying of a reasonable portion (defined as 10 per cent of a book, or one chapter, or one article in a newspaper or periodical) to be considered fair dealing.

The CLRC recommends that, for the purposes of research or study, this provision be amended to specifically cover copying from published works in printed form. This reflects the difficulty of defining 10 per cent of a work produced only in digital format.

The significant change to the deeming provision is the recommendation that it be extended from covering only copying of works to cover all dealings with works.

In other words, it may be possible for someone to copy the prescribed portion of 10 per cent from a number of different print sources and publish this compilation. This could be done without the copyright owners' permission, and without any payment being made to copyright owners for that use.

Copying by libraries

The report also recommends that the term "library" remain undefined, and that libraries conducted for profit become eligible to rely on the library copying provisions. Libraries would also be able to copy on behalf of users for a wider range of purposes, not just for the purposes of research and study as is the case currently.

Further, the purpose would be defined by the purpose of the user, not the copying institution, which would allow libraries and other information users to generate revenue from online copying without compensating copyright owners.

CAL is concerned that the CLRC's recommendations could be used in combination to create unplanned powers for users, at the expense of copyright owners' rights. When combined with, for example, the expansion of the library provisions to cover for-profit libraries, the open-ended fair dealing provisions could allow libraries within corporations to freely copy works on behalf of corporate staff. These libraries could then argue that they were copying for the purposes of research and study, and therefore no remuneration was payable to the copyright owners.

CAL fully supports maintaining open access to works for all users. But the CLRC's recommendations seem to allow free access for particular users (libraries and the legal profession in particular) in preference to others.

Further, if the CLRC's proposals were adopted, expanded access to works would be allowed without compensation to the copyright owners. In other words, the literary community would be forced to subsidise the provision of works to the public.

Ultimately, the CLRC report represents a real threat to Australian authors and publishers. Implementing its recommendations would allow wide, systematic use of the literary community's intellectual property without permission, without compensation to copyright owners, and sometimes to the commercial advantage of others.

CAL is working to ensure that the CLRC's recommendations are not accepted in their current form, by providing feedback on

the report to government and helping to stimulate debate about the issues it raises.

In the event that the report is adopted, it may be possible to narrow the interpretation of the new Act by bringing test cases, but this would be a very expensive process that could take five years or more.

Australia's authors and publishers should not have to wait that long to re-establish their right to fair reward.

Dianne Speakman

What could be fairer than fair use?

A simpler, more open-ended approach to fair dealing has been achieved by the CLRC report, according to Jamie Wodetzki, solicitor in technology and communications at Minter Ellison

The Copyright Law Review Committee (CLRC) report on *Exceptions to the Exclusive Rights of Copyright Owners* is not controversial. At least, it shouldn't be. The CLRC has merely done what it was asked to do: namely, to simplify the fair dealing and related "exceptions" provisions of Australia's existing *Copyright Act* in a way that is fair, flexible and technologically neutral.

Surprisingly, the Committee's recommendation that the technical and purpose-specific fair dealing provisions be replaced with a simpler, more open-ended "fair use" model has received a mixed reaction from Australia's copyright community. Some rightsholders have reacted in a particularly negative way. They have warned of substantial harm to their economic interests if the CLRC's recommendations ever become law. Fair use, they claim, will undermine the market for copyright works as we move deeper into the digital age. The reality is somewhat less frightening.

Fair dealing has long played a valuable part in Australian copyright law. It is relied on by students, schools, universities, libraries, researchers, news media and even lawyers for fair access to copyright materials in circumstances where there is a clear public interest in ensuring that access. Even assuming that fair dealing has not always struck a perfect balance in the past, that is no reason for its abolition, as some have suggested. Rather, as the CLRC report recognises, fair dealing must be retained as a balancing force in Australian copyright law, albeit in a simpler, fairer form.

The flexibility of the fair use model makes it far easier to apply to new technological circumstances than is the case with the current fair dealing provisions. In the U.S., fair use already demonstrated this technological neutrality on more than one occasion. The humble video recorder, for example, may well have suffered early extinction had the U.S. Supreme Court not held that home taping for "time shifting" purposes was a fair use. Home users have benefited and the film industry now makes money from a technology that it once considered a serious threat. Fair use has also been successfully applied in the software industry, with several U.S. courts holding that the decompilation of a computer program for the purpose of developing an interoperable program is permissible as fair use.

One of the great myths in the evolving debate over the CLRC's fair use proposal is that it may place Australia in breach of its obligations under international copyright treaties. At the 1996 Diplomatic Conference that passed the new WIPO Copyright Treaty, a formal "Agreed Statement" confirmed not only that all existing exceptions were acceptable, but that those exceptions and appropriate new exceptions could be carried forward into the digital environment. Not once was it suggested that the open ended (U.S.-style) fair use model failed these tests.

The CLRC deserves praise for making recommendations that simplify an unnecessarily complex set of provisions and that put the fairness back into fair dealing. It has also recognised that the fair dealing is as valid in the digital environment as anywhere else.

Although the views expressed in this article are the personal views of the author, they are consistent with the principles for which the Australian Digital Alliance (ADA) stands. The ADA is a broad alliance of interests favouring a balanced approach to copyright law reform. It draws support from the library, educational, interoperable software, consumer, research and Internet sectors and takes the view that copyright laws should balance protection and access in a way that best serves the public interest. Effective copyright protection for rightsholders must be weighed against the broader public interest in the advancement of learning, innovation, research and knowledge. In my view, it is almost certain that the ADA will be a strong supporter of the current CLRC report.

But the current CLRC report is only one part of a bigger picture. In the digital age, access to copyright material will depend as much if not more on the contracts and technological systems under which rightsholders make their works available to the public. If those contracts and systems override the access that fair dealing is supposed to ensure, the careful balance of rights and exceptions set out in the Copyright Act will become largely ineffective. The fair use debate is thus likely to reappear in the context of proposed new anti-circumvention laws. Hopefully the same principles will win through in the end.

Jamie Wodetzki