

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*

**T**he 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

