

Importance of fair dealing for libraries

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In the context of the Australian Government's accession to the US Free Trade Agreement and the recommendations of various parliamentary inquiries for the adoption of a US 'fair use' style exception in the *Copyright Act 1968*, the government in May initiated an inquiry into whether and how the current fair dealing exceptions ought to be extended.

The exceptions to copyright infringement are integral to the 'balance' between rights holders and 'users' of copyright material, as they allow consumers, libraries and educational and cultural institutions to make copies without seeking permission from rights holders, where the public interest in allowing copying outweighs the public interest in upholding rights holders' exclusive rights.

The issues paper initiating this review raised many interesting questions including: Do the current exceptions effectively balance the interests of rights holders with those of users of copyright material? If not, what additional exceptions to copyright infringement should be incorporated into the *Copyright Act 1968*? How should any additional exceptions be incorporated? Should a flexible 'fair use' provision be incorporated into the Act? And what would be the benefit of this?

For libraries, this review raised some important issues relating to institutional use of the fair dealing provisions. Libraries commonly rely on the exceptions to copyright infringement contained in Division 5, Part 3 of the Act: the 'libraries and archives exceptions'. However, to what extent do these exceptions not sufficiently cover the functions of libraries and archives? To what extent are libraries and archives required to rely on the fair dealing exceptions contained in Division 3, Part 3 of the Act? And to what extent does the law allow this?

The last three questions are perhaps particularly relevant to libraries. Fair dealing needs to be recognised as important, not only for users to exercise, but for libraries and other institutions to be able to exercise on behalf of users. There is an important link between the fair dealing provisions contained in Division 3 Part 3 and the libraries and archives exceptions. Although the fair dealing exceptions enable users to copy works for fair dealing purposes, it is not clear whether they allow third parties, for example librarians, to copy works on behalf of users. The distinction is important because in some respects the fair dealing provisions are broader than the libraries and archives provisions. For example, fair dealing enables copying for purposes of 'criticism and review', whereas under the libraries and archives exceptions, libraries can copy on behalf of users only for purposes of 'research or study' and in limited circumstances.

One reason for the lack of clarity in relation to this in Australian law is the case of *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625, where it was held that it is the purpose of the person actually undertaking the dealing that should be looked at in determining whether certain copying falls under fair dealing or not. According to this principle, if a librarian copies material on behalf of a user, it is the librarian's purpose that is relevant in determining whether the copying falls under fair dealing. This seems illogical given that it is the user, and not the librarian, who is actually using the material. The CLRC report on *Simplification of the Copyright Act 1968* recommended that this position be addressed legislatively to clarify that the user's purpose should be relevant in determining whether fair dealing applies. The ADA and ALCC have endorsed this position in their submissions in response to this review. Institutions such as libraries effectively act as 'agents' for private citizens in conserving and facilitating access to the nation's cultural heritage and resources. On this basis, libraries should be able to copy for users in all instances where users would be permitted to make such copies for themselves under fair dealing.

Another important issue for libraries that this review addressed, albeit indirectly, was the extent to which sections 51A and 110B of the Act sufficiently address the preservation functions of libraries. The current form of the provisions suggests that works cannot be copied for preservation purposes unless (a) they are held in manuscript or original form, or (b) they are published and have deteriorated, been damaged, or stolen. These provisions do not account for the variety of works that different institutions hold, and draw an artificial distinction between different kinds of works for preservation purposes which is not warranted. The current provisions provide a disincentive to loaning, or making available for public access, rare or out-of-print works that may be in reasonable condition but cannot be replaced in the event that they are lost, stolen or damaged. Expansion of the preservation exceptions would assist such library functions.

In brief: fair dealing and other copyright exceptions are fundamental to libraries. Libraries function to preserve and facilitate access to information on behalf of their patrons and for future generations. This review provides an opportunity to amend the *Copyright Act* to reflect this.

Sarah Waladan is executive officer of the Australian Digital Alliance (ADA) and copyright adviser (law and policy) for the Australian Libraries Copyright Committee (ALCC). More information about these organisations, including submissions in relation to the expansion of the Australian fair dealing provisions, can be found on their respective websites: <http://www.digital.org.au> and <http://www.digital.org.au/alcc/>.

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