Copyright Law Reform: How Will Copyright Respond to the Demands of the Digital Age?

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This short note supplements my presentation with Dr Warwick Rothnie on Saturday afternoon. For more information, please contact me on emily.hudson@law.ox.ac.uk.

In June 2012, the Australian Law Reform Commission received terms of reference for a review of free exceptions and statutory licences in the Copyright Act 1968 (Cth).1 The Commission’s Issues Paper, released in August 2012, contained fifty-five questions on which responses were sought.2 The bulk of these questions focused on empirical and normative matters regarding discrete classes of activity that are or might conceivably be the focus of an exception or statutory licence, such as cloud computing, private copying, activities by cultural institutions, activities with orphaned works, and educational uses. However the Commission also asked whether Australia ought to enact a broad, flexible exception such as fair use, and if so, whether this should replace or supplement existing purpose-specific exceptions.3 In this regard, it engaged not only with the question of whether exceptions should cover new and additional uses, but whether they should be written using a new and potentially more “flexible” drafting style.

Whilst my remarks at IPSANZ will focus particular attention on the ALRC review, I would also like to provide a more general critique of existing debates in relation to exceptions, many of which present the choice between closed-ended and open-ended provisions as turning on a preference for certainty or flexibility. I believe this is problematic for a number of reasons, and that we need to revisit the question of the optimal drafting of copyright exceptions in ways that are more nuanced and contextualised. I will engage not only with the question of whether a fair use-style provision would be a desirable addition to copyright law, a position that I support for

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3 Ibid [271]-[298], questions 52 and 53.
Australia, and which has been recommended by the ALRC in its Discussion Paper dated May 2013. Rather, I am also interested in questions of implementation: of the precise form any new exception should take, and what additional measures might be necessary to mitigate the risk that a broad open-ended exception will never become a meaningful part of the copyright system. My remarks will largely use the US fair use doctrine as a template for reform, although it must be acknowledged that other models are also possible. Indeed, Australia itself has experience with so-called flexible drafting, most notably through bespoke exception, s 200AB.

Section 200AB is a relatively recent addition to Australian copyright law, having been introduced by the Copyright Amendment Act 2006 (Cth). It has been described as a “hybrid” exception due of its use of both closed-ended and open-ended drafting elements. The main closed-ended aspect is that only nominated user groups may take the benefit of the provision: bodies administering a library or archives; educational institutions; and users with a disability and those assisting such people. In contrast, the legislature did not attempt to particularise the uses to which s 200AB might apply, and indeed the application of the exception to any given use is to be judged by, inter alia, factors said to have the “same meaning” as Article 13 of TRIPS: the circumstances of the use must amount to a special case; the use must not conflict with

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7 See Copyright Act of 1976 (US), §107. That provision states that a fair use of a copyrighted work is not an infringement of copyright. It also sets out a non-exhaustive list of acts that might constitute a fair use (“criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship and research”), and identifies four factors that shall guide the fair use analysis (the purpose and character of the use; the nature of the copyright work; the amount and substantiality of the portion used; and market effect). The language of §107 does not seem to preclude the consideration of other fairness factors, although empirical analysis suggests that, in practice, courts tend to limit themselves to those articulated in the statute: Barton Beebe, ‘An Empirical Study of U.S. Copyright Fair Use Options, 1978-2005’ (2008) 156 University of Pennsylvania Law Review 549, 561-564.

8 See, eg, Copyright Act 1987 (Singapore), s 35(1) (open-ended fair dealing exception).


10 The term archives is defined broadly in the Copyright Act to extend to the collections of bodies such as museums and galleries: Copyright Act 1968 (Cth), ss 10(1), 10(4).
a normal exploitation of the work or subject-matter; and the use must not unreasonably prejudice the legitimate interests of the owner of the copyright.\textsuperscript{11}

Some of the key points that I will cover include the following:

1. Discussion of the drafting options for exceptions is often framed around the respective merits of open-ended general provisions (often referred to in the legal rulemaking literature as standards) and closed-ended detailed provisions (rules).\textsuperscript{12} The drafting of fair use is arguably the most standard-like of all copyright exceptions: the statute merely operates as a guide for judges, with its fairness factors and list of indicative fair use purposes. In the US, the legislative history of §107 reveals a desire to preserve judicial decision-making in relation to fair use, which would suggest that fair use is intended to operate as a standard\textsuperscript{13} – although as we will see, the precise operation of any given legal provision cannot simply be ascertained in the abstract. Fair dealing would also seem to have standard-like qualities, although the fact that it is limited to certain prescribed purposes places it further down the spectrum towards rules.\textsuperscript{14} Other copyright exceptions are limited still further, such as many of the sector-specific exceptions for libraries, archives and museums (which are a particular focus of mine). Here it is not uncommon to see highly detailed provisions in which the legislature has attempted to spell out the scope of permitted conduct in advance, a quality that tends to suggest that legal regulation is designed to operate as a rule.\textsuperscript{15}

2. In debates about exceptions, certain qualities tend to be associated with each style of drafting (general and specific).\textsuperscript{16} Thus general exceptions like fair use are said to be flexible and responsive, but to also lack predictability for those regulated by

\textsuperscript{11} Copyright Act 1968 (Cth), ss 200AB(1)(a),(c),(d), (7).


\textsuperscript{13} See, eg, HR Report No 94-1476, 94th Congress, 2nd Session (1976) 66.

\textsuperscript{14} There are those who would argue that Australian case law on fair dealing has tended to prefer narrower definitions than that demanded by the statutory language, perhaps reading down the flexibility that inheres in these provisions: see, eg, Michael Handler and David Rolph, “‘A Real Pea Souper”: The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia’ (2003) 27 Melbourne University Law Review 381.

\textsuperscript{15} See, eg, David Lindsay, ‘Fair Use and Other Copyright Exceptions: Overview of Issues’ (2005) 23 Copyright Reporter 4.

\textsuperscript{16} For further discussion, see Emily Hudson, ‘Copyright Exceptions: The Experiences of Cultural Institutions in the United States, Canada and Australia’ (PhD thesis, Law, The University of Melbourne) 13-18.
the law. Because standards must be interpreted by a court or tribunal, this is said to introduce further uncertainty and expense for users. In contrast, specific exceptions are said to be characterized by certainty and predictability, but to also lack flexibility. It is said that the need for the legislature to prescribe the content of a detailed exception means that such provisions risk being under and over-inclusive, and makes them prone to redundancy.

3. Whilst there is some truth in this analysis of exceptions, we must approach such thinking with caution.\textsuperscript{17} This is because any approach in which different drafting options are presented as a choice between “flexibility versus certainty” can rest on simplified understandings of the operation of legal regulation. For example, the effect of any given statutory provision depends not only on its language, but its complexity and clarity, the broader statutory context, and the interpretative practices of judges, lawyers and those regulated by law. The “real world” operation of the any given legal regulation cannot simply be read off the statute book – more information is required. In the Australian context, I would question whether the current detailed copyright exceptions in fact offer certainty, which is one of the main benefits identified by those who would prefer that any reform (if it is to take place at all) occur within the current paradigm of specific provisions.\textsuperscript{18} Similarly, there is a body of research to suggest that the US fair use exception operates in ways that are far more predictable and coherent than claimed by some commentators and critics.\textsuperscript{19}

4. In asking questions about whether fair use is desirable and (if so) how it is best implemented into Australian law, the input of lawyers is crucial. You get to see, first hand, the types of questions that are being addressed to lawyers in commercial law firms; the degree to which exceptions are relevant to your clients; and the factors that influence the copyright management strategies of your clients. You are also at the frontline of any change to the Copyright Act, as you will have a key role in educating clients about the law, and in providing advice on copyright compliance and commercialization. Standards like fair use require interpretation not just by courts but by users in combination with their legal advisors, and industry practices can be just as important as case law in fleshing out the content

\textsuperscript{17} This point has also been argued eloquently by Robert Burrell and Allison Coleman, Copyright Exceptions: The Digital Impact (Cambridge University Press, 2005).

\textsuperscript{18} See also Burrell and Coleman, ibid, 252 (arguing that certainty is not an inevitable feature of specific exceptions, thus ‘to a large extent the strongest argument for the current approach rests on an illusory foundation’).

of standards. If Australia adopts fair use, lawyers will therefore play a crucial role in its implementation either as a more meaningful or less meaningful part of the law.

**Empirical work regarding s 200AB**

My presentation will refer to interview-based fieldwork conducted with leading Australian cultural institutions in 2012-2013. This fieldwork suggests that s 200AB has failed to become a meaningful part of institutional copyright practices, and that this state of affairs shows little prospects for change. One question that arises from this research is whether a similarly restrictive interpretation is likely for *all* flexible exceptions, such that an Australian fair use doctrine would suffer a similar fate. However I argue that when s 200AB is examined more closely, it can be seen that its muted reception is an entirely predictable consequence of the way that provision is drafted. The failures of s 200AB should not, therefore, be seen as a rejection of flexible exceptions per se. Indeed other behaviours and practices suggest there is much potential for fair use to become a workable exception, at least for Australian cultural institutions.

**Conclusions**

Although I am a supporter of fair use in Australia, I maintain doubts that the Australian Parliament will introduce a fair use exception any time soon (for reasons that I will explain). But I am hopeful that the ALRC’s Final Report will articulate in the strongest and most compelling terms the case in favour of fair use.