The Director, Copyright Law Section
Department of Communications and the Arts
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Canberra ACT 2601

By email: copyright.consultation@communications.gov.au

31 May 2018

Response to the Australian government's copyright modernisation consultation paper

Dear Sir or Madam

The British Copyright Council (BCC) welcomes the opportunity to submit its comments on the copyright modernisation consultation paper issued in March 2018 by the Department of Communications and the Arts.

The BCC represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights. Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers.

We previously (in July 2013) commented on the Australian Law Reform Commission's discussion paper, "Copyright and the Digital Economy", and in particular on the discussions concerning "fair use". We consider that those arguments remain valid and re-attach them at Appendix 1 as part of this submission.

Since that time, the UK has seen the legislative implementation in 2014 of recommendations made by the Hargreaves review[1], and we therefore hope the Department of Communications and the Arts will find our present perspective, together with a reminder of our earlier comments, helpful.

The Consultation is right to identify the fundamental importance of balancing "the interests of innovators, investors and creators with the health, economic and social welfare of consumers and Australian society as a whole". As set out below, the BCC stresses the need both for a fair balance in substance and a fairness of approach.

Economic evidence: Strong, objective economic evidence should be the sine qua non when considering changes to the copyright system. Furthermore, we would like to underscore the importance of acquiring up-to-date information, as economic evidence collected in previous consultations is made redundant by the pace of development in technologies and business models. For instance, streaming services for music, which are the prevalent means of accessing music in 2018, were taken into account only to a limited extent, if at all, in previous consultations and impact assessments.

[1] "D g ta opportun ty: rev ew of nte ectua property and growth", 2011

The Hargreaves review suggested economic benefits to the UK of £7.9bn a year resulting from the changes that it recommended but gaps in the evidence on which they were based cause us to remain doubtful that the official impact assessment, due in 2019, will substantiate this at all. Uncertainty around the lack of definition of terms such as quotation and parody, caricature and pastiche, will indeed have caused the creative industries, and thus creators and performers, losses in terms of licensing revenue.

At the time of the review, the BCC and the wider UK creative industries expressed serious concerns regarding the underlying economic evidence and the methodology applied. When the private copying exception was later overturned, it was because the High Court found the government had based its decision to introduce that exception on defective evidence. We would therefore stress again the critical need for a sound evidence base when assessing the likely impact of copyright reforms.

Question 1
To what extent do you support introducing:

- **additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?**
- **a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?**

The BCC submits that there is no evidence establishing that the fair use system provides greater benefits than fair dealing. Meanwhile, interpreting "fair use" is more complex, resulting in greater uncertainty and higher costs for all parties concerned[2]. Consequently, fair use is detrimental to all businesses in the creative value chain, from the original creator to the publisher or record company, to the platform provider and ultimately to the end user (further details in our original submission to the ALRC's discussion paper, "Copyright and the Digital Economy", as attached).

We respectfully challenge the assertion of the Productivity Commission "that the last 30 years of case law have generated a fairly coherent set of principles [for fair use] that lend themselves to forward-looking application". The level of references to higher courts in fair use cases indicates that, even 170 years after the first fair use case was brought in 1841, there is still no certainty in the application of fair use principles, especially in first instance courts. Recent examples include:

- Dr. Seuss Enterprises v. ComicMix U.S. District Court, , SD Cal., 9 June 2017
- Disney Enterprises v VidAngel U.S. Court of Appeals, 9th Cir., 8 June 2017
- Paramount Pictures v. Axanar Productions U.S. District Court, C.D. Cal., 3 Jan. 2017
- Penguin Random House v. Colting U.S. District Court, SDNY, 7 Sept. 2017
- Graham v Prince U.S. District Court, SDNY, 18 July 2017
- TCA Television v. McCollum U.S. Court of Appeals, 2d Cir., 11 Oct. 2016
- VMG Salsoul, LLC v. Ciccone U.S. Court of Appeals, 9th Cir., 2 June 2016

Furthermore, cases often result in split opinions within individual courts, as well as being subject to differing approaches by the most relevant courts when seeking to interpret the doctrine of fair use, e.g. Supreme Court, 2nd or 9th Circuit Courts or the United States District Court for the Southern District of New York.

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[2] P ease see the Tay or Wess ng report on the mpact of costs of ega proceed ngs n fa r dea ng and fa r use n the annex to our 2013 response to the ALRC, enc osed.

For a comprehensive analysis of fair use cases, we note the Empirical Study of US Copyright Fair Use Cases, 1978-2014[3] by Professor Barton Beebe, NYU School of Law (www.bartonbeebe.com). This 2015 update of his original 2008 study[4] highlights the varying approaches to fair use in different courts and the high reversal and appeal rates in fair use cases.

We submit fair use will damage creators and creativity, risking livelihoods and an important economic sector, with the copyright industries generating $122.8bn for the Australian economy alone[5].

Simply replacing the fair dealing approach to exceptions established under the 1968 Australian Copyright Act, which in turn was based on the UK Copyright Act 1911, with a US-style fair use system will create years of uncertainty. This is particularly problematic for those who face practical difficulties in terms of meeting legal costs should they seek to assert rights. The system of interpreting fair dealing is well established in Australia and it will take time to replicate more than 170 years of jurisdiction on fair use in the US; and, even then, there will be no certainty.

In comparable circumstances, the UK government in 2014 introduced new exceptions or amended existing exceptions, addressing similar areas as those contemplated by the current modernising copyright consultation in Australia[6].

While the BCC opposed many of those changes, including the private copying exception that was later quashed, and we await a detailed impact assessment to determine how well they balance the interests of various stakeholders, we strongly prefer the UK's nuanced approach of adding or tailoring existing exceptions, including fair dealing exceptions, over a broad-brush US-style fair use regime.

New exceptions on quotation, private use and text and data mining
The BCC would briefly like to share the experience in the UK, where exceptions in these areas were introduced in 2014.

Quotation
The new law reframed the existing quotation exception by widening it to purposes beyond criticism and review, under the condition that:

- The work has been made available to the public
- Use is fair dealing
- Extent no more than is required by the specific purpose
- Sufficient acknowledgement

[3] http://www.bartonbeebe.com/BeebeFUPres2015.pdf

[4] "An Emp r ca Study of US Copyr ght Fa r Use Op n ons, 1978 2005", Un vers ty of Pennsy van a Law Rev ew, January 2008

[5] Data 2015 2016. Source: "The Econom c Contr but on of Austra a's Copyr ght Industr es 2002 2016", PwC 2017

[6] In part cu ar, n 2014, the UK ntroduced except ons for data ana ys s for non commerc a research; d sab ed persons; and for parody; and amended ex st ng except ons on research, brar es and arch ves; educat on; quotat on and pr vate copy ng. In the same year the Copyr ght and R ghts n Performances (L cens ng of Orphan Works) Regu at ons a so came nto force.

There is a considerable amount of uncertainty around this new exception, in particular concerning the reference to “quotation from the work (whether for criticism or review or otherwise)”. This directly impacts licensing discussions at the expense of creators and performers, in particular if the quotation exception is claimed for commercial uses.

Private use

The UK government introduced an exception for personal copies for private use. Following a Judicial Review instigated by composers, performers and their representative bodies this exception was quashed due to the lack of evidence that the new exception without fair compensation does not create harm for the right holder. Fair compensation is a requirement under Article 5 (2b) of the European Union directive on copyright in the Information Society and ensures compliance with the Berne Convention Three-Step Test; specifically, that the exception does not unreasonably prejudice the legitimate interests of the right holder.

Text and data mining

UK Government introduced an exception on data analysis for non-commercial research for a person who already has a right to access a copyright work (whether under a licence or otherwise) to copy the work as part of a technological process. New Section 29A provides a completely new, and highly controversial, exception for “text and data analysis for non-commercial research” limited only by the need to establish that the use is:

- “For the sole purpose of research for a non-commercial purpose”,
- Using a copy to which the researcher has “lawful access”,
- With “sufficient acknowledgment”.

The exception encompasses “the copying of material in order to carry out a computational analysis of all the materials contained therein, for the purposes of non-commercial research.”

It is noteworthy that the new exception has no impact on the freedom of parties to enter into a contract concerning the level of accessible material — although whatever the researcher is contractually allowed to access, s/he must be permitted to copy for non-commercial text and data mining. However, when the application of exceptions is routinely linked to additional contractual licensing terms agreed between rights owners and users, the issue of simplistic no-contracting-out of exceptions and limitations creates legal and economic uncertainties highlighted during the UK Hargreaves debates. These concerns remain.

To the knowledge of the BCC the new exception is working in the interests of all stakeholders.

Education

Amended Section 32 CDPA provides a revised exception for fair dealing with a work:

- For the purposes of Illustration for Instruction (c.f. Art 5 (3a) of the Information Society Directive);
- For non-commercial purposes;
- By a person giving or receiving instruction;
- With sufficient acknowledgment.

Amended Section 36 CDPA provides for copying and use of extracts of works by educational establishments:

- For the purposes of instruction;
- For a non-commercial purpose;
- With sufficient acknowledgement.

Not more than 5% may be copied in any 12 months, but the existing proviso for existing licences is retained, so that the exception will not apply "if or to the extent that licences are available authorising the acts in question and the educational establishment responsible for those acts knew or ought to have been aware of that fact". This means a licence can cover the scope of the exception and more according to the needs of the parties; this would not be contracting out but fine-tuning the exception. This approach in Section 36 CDPA is well-established and offers a practical solution for educational establishments and right holders.

Question 2

What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- **section 200AB**

- **specific exceptions relating to galleries, libraries, archives and museums.**

We note that the changes regarding libraries and archives in amended Sections 41 to 43 CDPA streamlined and extended existing provisions for supplying copies to other libraries (Section 41), replacement copies (Section 42), single copies for research or private study (Section 42A), and copies of unpublished works (Section 43).

The BCC considers these provisions practical from a right holder perspective without unduly interfering with their copyright interests.

Question 3
Which current and proposed copyright exceptions should be protected against contracting out?

The Consultation paper helpfully acknowledges the balance between ensuring that copyright exceptions operate as intended and the freedom to enter into a contract that allows parties to fine-tune the application of laws, including copyright laws. In the UK, this question has been discussed in detail in the context of the copying and use of extracts of works by educational establishments (Section 36 CDPA), and in relation to the ability for educational establishments to make recordings of broadcasts and works included in them for subsequent non-commercial educational use (Section 35 CDPA). References to licences in paragraphs 5 and 6 of Section 36 and in Section 35(4) CDPA provide the opportunity for right holders and educational establishments to adapt the scope of permitted copying and use according to their needs, while taking up licensing options as required. The scope of the exception represents the minimum for permitted activities, which then can be modified by individual contractual arrangements. A general ban on contractual overrides would run counter to this objective.

The BCC submits that only option 1 (statutory exception), making unenforceable contracting out of only prescribed purpose copyright exceptions, enables the differentiated approach required for a functioning copyright system. Sometimes a contractual approach to exceptions will be preferential for rights holders as well as beneficiaries of exceptions.

The BCC is not in a position to suggest which prescribed purpose copyright exceptions should be protected against contracting out; it needs to be assessed on a case-by-case basis.

However, the precise wording of the legislation is important. Sometimes when rights are licensed in 'blanket' licences by collecting societies, it is impractical for the parties to ascertain which of the high volume of uses fall under exceptions. It is therefore sometimes practical to include all uses in the calculation of the licence fee, even though some of them could fall under an exception. It is important that any legislative provision does not obstruct this business practice, so the wording should be clear in only voiding contractual clauses that prevent uses permitted under an exception and not those that include such uses within the mechanics of the licence.

Question 5 - Access to Orphan Works

To what extent do you support each option and why?

- **statutory exception**
- **limitation of remedies**
- **a combination of the above**

Noting the inherent shortcomings of any national approach to orphan works, and the lack of evidence so far of economic savings delivered through application of licensing schemes[7], the BCC submits that the UK approach introduced in 2014 appears practicable, namely:

- a licensing scheme for the commercial use of orphan works (the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014) administered by the UK Intellectual Property Office, as well as
- a more focused exception for the non-commercial use of orphan works by a publicly accessible library, an educational establishment, a museum, an archive, a film or audio heritage institution, or a public service broadcasting organisation implementing the European Union Orphan Works Directive 2012 (The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014.

The BCC notes that this two-fold approach is working, specifying different solutions for commercial and non-commercial use; it addresses various possible users (taking into account the unique position of cultural and collecting institutions), and possible commercial and non-commercial uses referred to in the Consultation document. We welcome that the Productivity Commission generally advocated the differentiation between commercial and non-commercial activities.

[7] The UK Government ana ysed the mpact of the new cens ng scheme n ts pub cat on, "Orphan works: Rev ew of the f rst twe ve months", wh ch noted than 294 censes were granted w th a tota va ue of £8,001.

However, we would encourage the Department of Communication and Arts to take into account the recent consultation in the Digital Platforms Inquiry conducted by the Australian Competition and Consumer Commission. Activity of digital platforms and the existence of orphan works in the digital environment are very closely linked. In order to speed transmission of content over the internet, digital platforms apply technological measures that strip metadata (including author's name and/or other evidence of ownership) from uploaded digital content. While this may enhance the user experience (faster access), it makes it more difficult for creators to monitor use of their content and identify infringement. This, in turn, diminishes the commercial value of their work as they are unable to demand license fees in circumstances where the content is available for free. Accordingly, it is submitted that any proposal for dealing with orphan works must involve an obligation on the prospective user to make sufficiently broad enquiries (a "diligent search"). In the UK, the IPO has issued detailed guidance[8] on what such diligent search should involve.

Given that the issues with orphan works in the digital context are often caused by online platforms and other intermediaries, the BCC submits that the proposed Option 1, i.e. a statutory exception allowing for the use of orphan works, would cause undue prejudice to authors of copyright works and further add to the dominant position of digital platforms, already deriving significant benefits under safe harbour rules and the framing loophole.

Questions 6 and 7
No comments

We trust the above will be helpful in your consultation process. Please do not hesitate to contact me if the British Copyright Council can be of any further assistance.

Kind regards

Elisabeth Ribbans
Director of Policy & Public Affairs

Encl. BCC letter to Australian Law Reform Commission 30 July 2013

[8] https://www.gov.uk/government/pub cat ons/orphan works d gent search gu dance for app cants

Appendix 1

30th July 2013

The Executive Director
Australian Law Reform Commission
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Sydney NSW 2001

Email: copyright@alrc.gov.au & web@alrc.gov.au

Dear Sir or Madam

Copyright and the Digital Economy – inquiry and public consultation process

The British Copyright Council welcomes the opportunity to submit its comments on the discussion paper "Copyright and the Digital Economy."

We hope that our experience during the discussions at a policy level on whether the United Kingdom should replace its "fair dealing" system with a US "fair use" system is helpful. The UK Government announced its comprehensive review of IP in November 2010 carried out by Professor Hargreaves. More specifically the review was tasked to "look at what the UK can learn from the US's "fair use" rules covering the circumstances in which copyright material may be used without the rights-holder's express permission."[1]

In his report[2] as subsequently accepted by the UK Government, Professor Hargreaves concluded that the wholesale adoption of a fair use approach into the UK legal framework would not be advisable. In particular he recognised that the success of the US technology sector is based on factors other than fair use such as the availability of a skilled work force and the different approach in the US to investment. In fact, the original statement that fair use was the key element for the establishment of Google in the US has been proven to be wrong.[3]

The British Copyright Council respectfully submits that the fair use system does not provide greater benefits than fair dealing. Interpreting "fair use" is more complex, resulting in greater uncertainty and it is more costly for all concerned. Consequentially, fair use is detrimental to all business in the creative value chain, from the original creator to the publisher or record company to the platform provider and ultimately to the end user.

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights. Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations operating within the creative and cultural industries. Our members also include collective management organisations which represent right holders and which enable access to works of creativity.

[1] http://www.ipo.gov.uk/about/press/press-release/press-release-2010/press-release-20101104.htm
[2] http://www.ipo.gov.uk/preview-finalreport.pdf
[3] http://www.theregister.co.uk/2011/03/03/hargreaves_and_google/

We submitted a detailed paper to the call for evidence for the Hargreaves review of IP in the UK in which the British Copyright Council [4] concluded that the fair dealing provisions in the UK Act provide the most effective method for addressing abuses, or too restrictive use of copyright licensing, particularly in a commercial context. Targeted exceptions, such as those in the UK Act (and in the Australian Act), are the best means for providing for non-commercial uses and guarding public access:

"We consider that it would be very damaging to introduce a general fair use exception into UK Copyright law. As stated above, the US fair use law was introduced in the US and was based on pre-existing case law. The same applies to the introduction in the UK of the Fair Dealing provisions. The Copyright Act 1911 was, preceded by case law, which assisted in the interpretation of the new legislation. If a US-style general fair use provision is introduced into UK copyright law without any existing case law to aid in its interpretation, there is bound to be a plethora of litigation to establish exactly what it means. No doubt, reference will be made to US cases. However, as mentioned above, these cases are often contradictory and have not given rise to great clarity. The existing Fair Dealing law in the UK seems to work well and does not give rise to a large amount of litigation. This would suggest that the UK law is clear and reasonably well understood and is working effectively."

On page 4[5] onwards the British Copyright Council compared the UK fair dealing system (similar to the current Australian System) with the US fair use approach highlighting the (I) Complexity & Uncertainty of the US approach and (II) the Legal Costs and Expenses of US Fair Use Cases.

(I) Complexity & Uncertainty of the US approach

We believe that the UK's relatively clear and comprehensive legislation is the reason for there being only limited cases on exceptions being brought to Court. This compares with the large amount of litigation in the US on how to interpret and apply the fair use exception. An issue which is now seen as a concern within the US Copyright Office. The interpretation of "fairness" appears to be a lottery, depending on the respective judge and his views; leading to different interpretations between various instances which create great uncertainty.

(II) Legal Costs and Expenses of US Fair Use Cases

The uncertainties inherent in the fair use cases make it counterproductive, in particular for individuals and SMEs both in the creative and technology sector to rely on fair use; not only is it expensive to carry through a fair use case, there is the risk of suit by established players. As we have said, fair use is extremely complex and leads to uncertainty due to the broad judicial interpretation of the factors. This complexity and uncertainty causes the overruling of lower court decisions which in turn leads to further litigation and expense.

(III) Fair Dealing and Fair Use

We also submitted a paper prepared for us by the law firm Taylor Wessing on the impact of costs on legal proceedings in practice on Fair Dealing and Fair Use and which we add as an Annex.

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[4] http://www.ipo.gov.uk/ipreview-c4e-sub-bcc.pdf
[5] http://www.ipo.gov.uk/ipreview-c4e-sub-bcc.pdf

Existing fair dealing exceptions/ Licensing

We respectfully submit that the current Australian Copyright law already contains detailed wording on the areas the ALRC suggest be covered by fair use, i.e. Non-consumptive Use, Private and Domestic Use; Transformative Use and Quotation; Libraries, Archives and Digitisation; Orphan Works; Educational Use; Retransmission of Free-to-air Broadcasts. There is no practical justification to change the existing system for presumably ideological[6] reasons. As becomes clear from issues raised in your paper; changing the system is also complicated both at the drafting stage and the interpretation stage (in the absence of any case law on fair use in Australia).

Indeed the importance of clarity in drafting is at the centre of the current Technical Consultation on proposals to apply fair dealing to a number of narrow new exceptions in the UK. The BCC is able to provide further views and background to this, if this would be of assistance.

The activities to be addressed by the introduction of fair use are already covered by current licensing activities operating in parallel to the fair dealing exceptions. Introducing a fair use approach as outlined in the draft proposal of ALRC will conflict with the normal exploitation of creative works and thus the internationally binding Three Step Test.

If you need any further information or assistance from the British Copyright Council, please do not hesitate to contact me.

Yours faithfully,

Janet Ibbotson
Chief Executive Officer

[6] Given the absence of any economic evidence justifying the changes proposed; and the alternatives provided to introducing a fair use approach, i.e. introducing new, and extending existing, exceptions

Annex 1

TaylorWessing

FAIR DEALING/FAIR USE

The purpose of this note is to summarise the information which we have been able to gather relating to:

the number of UK Fair Dealing cases and the number of US Fair Use cases since 1 January 1978; and

the cost of copyright litigation in the UK and in the US.

As will be seen, the information is far from complete. However, it does shed some light on these issues.

Number of UK Fair Dealing Cases

This was the most straightforward area to research. In our research, we have looked at decisions made on or after 1 January 1978, which is the date on which the US Copyright Act 1976 came into force and introduced for the first time in the US a statutory Fair Use regime.

On 1 January 1978, the Copyright Act 1956 ("the 1956 Act") was still in force in the UK and it remained in force until 31 July 1989. On 1 August 1989, the Copyright, Designs and Patents Act 1988 ("the 1988 Act") came into force in the UK and it is still in force, although it has been amended on several occasions since 1989.

Under both the 1956 Act and the 1988 Act there were/are a number of exceptions to copyright. In researching the cases, we have drawn a distinction between cases decided which involved the Fair Dealing provisions and those which involve other exceptions. Under the 1988 Act, there are 64 sections which set out the "act permitted in relation to copyright works". However, only two of these (Section 29 and 30) deal with Fair Dealing as such. Under these sections, Fair Dealing is permitted for the purposes of private study (which must not be directly or indirectly for a commercial purpose) or non-commercial research, criticism or review or the reporting of current events.

The remaining exceptions (Sections 28 and 31 to 76) cover a wide range of activities such as, for example, recording for purposes of time shifting, incidental recording for purposes of broadcast etc. There was a similar regime in the 1956 Act, only with fewer exceptions. The reason that we have included the other exceptions is that some of them would be covered in the US by the US Fair Use legislation.

The number of reported decisions in the UK since 1 January 1978 is as follows:

(i) Number of Fair Dealing cases decided under the 1956 Act: 4

(ii) Number of Fair Dealing cases decided under the 1988 Act: 17

(iii) Number of other exceptions cases decided under the 1956 Act: 13

(iv) Number of other exceptions cases decided under the 1988 Act: 40[78]

The total number of cases decided[9] during the period is 67 or approximately two per year. We can provide lists of these cases (together with short summaries) if this would be of use.

Number of Fair Use Cases in the US

It has proved much more difficult to obtain details of the number of reported decisions in Fair Use cases in the US.

We have been able to establish that there were not less than the following numbers of such decisions during the years ended June as set out below:

June 2010 - 8

June 2009 - 8

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[7] Five of these cases also dealt with fair dealing so are included in that total as well. To that extent, there is duplication between the two totals. Those five cases are: *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch); *HM Stationery Office v Green Amps Ltd* [2007] EWHC 2755 (Ch); *Universities U.K. Ltd v Copyright Licensing Agency Ltd* [2002] E.M.L.R. 35; *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2001] Ch. 257

[8] Two of these cases also considered the 1956 Act so are included in that total as well. To that extent, there is duplication between the two totals. Those two cases are: *Jules Rimet Cup Ltd v Football Association Ltd* [2007] EWHC 2376; and *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328.

[9] Excluding the duplication referred to above.

June 2008 - 7

June 2007 - 8

In an article entitled "An Empirical Study of U.S. Copyright Fair Use Opinions, 1978 – 2005", published in the University of Pensylvania Law Review – January 2008 Vol. 156 No. 3 Barton Beebe identified 306 reported opinions from 215 cases. This means that during the 28 years from 1 January 1978 to 31 December 2005 there was an average of just under 11 reported opinions per year.

Legal Costs and Expenses of UK Fair Dealing Case

It is difficult to generalise. The costs of any particular case will depend on a number of different factors, such as the amount of evidence, whether it is disputed, the complexity of the case, prospects of preliminary references to the ECJ and so on. However, the costs of bringing or defending a copyright case which goes to a full trial and a reported decision is likely to be somewhere between £250,000 and £500,000 (excluding any appeals). The newly reinvigorated Patents County Court (which has a cap on recoverable costs of £50,000 and is intended to provide a more streamlined judicial process) may mean that this figure may drop for the smaller and less complicated cases.

Legal Costs and Expenses of US Fair Use Case

A report by the American Intellectual Property Law Association estimates that the average cost to defend a copyright case is just under $1 million. [Cited at page 42 in an

article by Giuseppina D'Agostino entitled "Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use – published in Comparative Research in Law & Political Economy 2007 (Vol: 03 No. 04)].

This is clearly an average figure and some cases will be more expensive and some less. For example, in the Google Books litigation, the latest draft of the Amended Settlement Agreement provides that Google will pay $30 million towards the Plaintiffs' attorneys fees and costs. The Google Books case was a class action, involved a large number of parties and was extremely complex. Nevertheless, it was a Fair Use case and does demonstrate how difficult, complex and expensive US litigation involving Fair Use can be.

Dated: 22 February 2011