

The Director, Copyright Law Section
Department of Communications and the Arts
GPO Box 2154
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Re: Copyright Modernisation Consultation Paper

Overview

1. This submission supports the importation of a US style fair use exemption to Australia's *Copyright Act 1968* (Cth). It agrees with the numerous scholars and ALRC reports¹ that have recommended such a reform for the last 20 years. My contribution to this discussion, apart from lending support to those arguments already adequately debated and expressed, is primarily to highlight a significant problem with the current fair dealing exception for parody and satire. In highlighting this problem the push for a fair use doctrine is strengthened.
2. The problem I wish to address with the parody and satire fair dealing provision is a problem in defining boundaries of a genre. My research has discovered a considerable gap between literary theory on what a parody is and the ordinary and natural meaning, dictionary meanings, and legal interpretations used in similar contexts in other jurisdictions. This gap causes a measure of uncertainty as to whether a parodist can safely parody a work or whether their interpretation of what a parody is, is limited to what a court defines as one. This in turn leaves the exception as a hollow user's right for parodists who in such uncertain territory

¹ Since 1998 to 2017 there have been eight government inquiries considering the issue, six of which, have recommended a fair use exemption be adopted. Apart from an overwhelming amount of Australian scholars (too numerous to cite here) even international scholars such as Patricia Aufderheide and Dorian Hunter Davis from the US have speculated on Australia's long, wide ranging policy debate on this issue. They also argue that the process of creation as studied by academics should be further considered in the process as creators themselves may not have considered the implications of their creative practices: Patricia Aufderheide and Dorian Hunter Davies, 'Contributors and Arguments in Australian Policy Debates on Fair Use and Copyright: The Missing Discussion of the creative Process' (2017) 11 *International Journal of Communication* 522, 540.

would be dissuaded and deterred from creating in such a complex genre, defeating the purpose of the exception.

3. The adoption of a fair use doctrine rather than rigid categorisation of texts under the current fair dealing regime removes the definitional inquiry and moves the focus to the issue of fairness allowing parodists to freely create while respecting the source author's commercial market.

Answers to Specific Questions Asked

4. Flexible exceptions: I would support a 'fair use' exemption. While it is true that the fair dealing exceptions have evolved over time, the process takes many years and is unable to keep up with new technologies and innovations as they surface.² Even if such review and change was moved to a regulation making power within the relevant Minister's control, the community consultation process would still need to be initiated with stakeholders still having to petition each time a new category is lacking. A fair use exemption that looks to the very principle for allowing exceptions would be adaptive and provide much needed guidance to creators on what they can and can't do with previous works. Additionally, as argued in the more substantive submissions below, having categories rather than a broad approach necessarily involves an interpretive exercise in defining the boundaries of those categories when much creative work may overlap or not fit nicely into a definition whilst still being a fair use. Instead of the courts determining genres such as criticism, review, parody and satire, a more open ended approach will look instead to the harm to the original creator and the transformative use. The question becomes whether the derivative use is original and thus of value to society rather than a mere copy that lessens the creator's ability to exploit their labour.
5. Illustrative purposes would be needed in the exemption but more importantly the concept of fair use must be clearly defined. The American fair use factors³ include looking at the purpose and character of the work, the nature of the work, the amount and substantiality and the effect of the use upon the potential market for, or value of, the copyrighted work. The last factor is of the most importance. Amount and substantiality are dependent upon the nature of the work. For example, parody must, by its very definition, use enough of a previous work to conjure it. The factors used in the US are open-ended and calls upon the discretion of the court. Illustrative uses are then provided for in the preamble of s107 which has led the ALRC to recommend a similar stance in Australia. However, if we properly investigate the theory

² As noted in the Consultation Paper evolution has been a slow process with changes in 1980, 2006 and 2017.

³ *Copyright Act 1976* (US) Title 17, Section 107

behind fair use then the illustrative purposes are less likely to become a de-facto reversion to a categorical approach and will be used as intended: to guide a lay person as to certain ways to use creative content without being restricted to these uses.

6. There also exists the problem that the American system is based on a commitment to freedom of speech that is not apparent in our legal system. If we get to the core of why exceptions are provided in the first place, we get closer to how to frame the exemption, focusing on balancing the right of creators against that of transformative users and a definitive view of “reasonableness.” When it comes to moral rights we are happy to let the courts determine the boundaries of reasonableness, so it makes sense to also trust the courts when it comes to fair use. When the courts are no longer burdened with categorising uses and instead focusing on harm and transformativeness it becomes easier to guide creators as to what would be appropriate use.
7. Contracting out of exceptions: If we were to adopt an open ended fair use exemption, it must be unable to be contracted out of. Given that most transformative creators would access original works online and the opportunity is then given for restrictive contracts, it would defeat the purpose of the exemption if it became standard industry practice to restrict access to works to prevent derivative uses. It may be best however to introduce the fair dealing exemption and then review how the industry reacts to it in order to see where the gaps are in protection that ameliorate the usefulness of the doctrine.
8. Access to orphan works: A fair use exemption is unlikely to solve all of the problems with orphan works given that a use could commercially harm the original author if found. A discrete exemption may be a viable way to combat this problem. Another solution might be to provide a database in which an application may be made for the use of a work when no reasonable search elicits any authorship information. A waiting period may then apply and a small transaction cost depending on the use could then be used to fund limited compensation if authors do later dispute authorship. This would mean litigation would not need to be taken which would lessen the burden of users and provide certainty. This database could then distinguish uses that are commercial, private or those of cultural and collecting authorities and the transaction fee would then reflect the approximate harm should an author miss out on a commercial licence deal.

Further Submissions

9. From the very infancy of Copyright, it has been accepted that some exceptions must be made for the use of copyrighted material in order to avoid restricting creativity and innovation. The United States Supreme Court argued that the fair use doctrine “permits (and requires) courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster,”⁴ and aims to resolve “the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it.”⁵ This is in direct contrast to Australia’s model of discrete, rigid, and in some cases uncertain, categories of fair dealing.
10. The dynamic evolution of technology has seen new ways for people to transform, create, innovate and participate in cultural texts. These developments, however, are hamstrung by our current copyright laws and suggest a need for Australia to modernise and enjoy similar flexibilities with our counterparts overseas while still protecting the intellectual labour of our creators. While the Attorney-General has stated that the fundamental principles of intellectual property law have not changed because of the emergence of new media and new platforms⁶, the way certain uses are monitored and flagged has been. These transformative, innovative and collaborative ways of intersecting with cultural texts that traditionally were “under the radar” are in the public benefit yet are becoming limited and restricted.
11. The current fair dealing provisions within Australia’s *Copyright Act* give piecemeal protection to a number of uses but fail to address the determinative factor as to why these separate genres are seen to be fair while others are not. The basic premise of fairness in the exceptions seem to rely on the following:
 - The uses do not compete with the original
 - The uses are of benefit to society
 - On balance the uses do not harm the original author in any way
 - It may be unreasonable or even impossible to get copyright permission for some uses which in turn can create a market failure.⁷

⁴ *Campbell, aka Skywalker, et al. v. Acuff-Rose Music Inc.* (1994) 510 U. S. 569 at 577 (quoting *Story J in Emerson v Davies* 8 F Cas 615 at 619 (No 4,436) (CCD Mass 1845)).

⁵ *Ibid* 575.

⁶ Senator George Brandis, Commonwealth of Australia, *Parliamentary Debates*, Senate, 5 December 2013 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F0079e0e5-e868-49d0-99d6-4be680886bd3%2F0094%22>

⁷ A market failure is a concept within economic theory wherein the allocation of goods and services by a free market is not efficient: see Charles Rowley “Law and Economics from the perspective of Economics” in *The New Palgrave Dictionary of Economics and the Law* (Palgrave Macmillan Limited, Volume 2, 2002) 474. Market failures can be viewed as scenarios wherein individuals’ pursuits of pure self-interest lead to results

12. Additionally, with the advent of moral rights in Australia, there is less need for copyright holders to tightly control derivative uses of their works, as anything that may bring the commercial value of their work down could be argued as derogatory treatment and their acknowledgement as author is always protected by the attribution provisions.
13. Small scale uses of works that do not compete commercially with original works are often unfairly prejudiced by a strict fair dealing regime. Social media is a good example of this, where a child singing along to her favourite song is unlikely to damage the economic rights of a copyright holder, yet is currently prohibited by a technical reading of the Act. Likewise, such innocent uses as memes made from film stills or even school plays do little to hurt the original creator's commercial market, yet are technically breaching the Act. Such uses may not be frequently litigated or targeted, but the chilling effect and potential liability is a cause for concern, especially online where slight uses can be flagged and found much more easily than ever before. As argued by Siva Vaidhyanathan, the "imperfect and sometimes inefficient mechanism" used by copyright to regulate information are part of the strengths of the system, "a democratic safeguard."⁸ As Pierre Leval notes, "Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of copyright monopoly. To the contrary, it is a necessary part of the overall design. "
14. Many instances of fair use that are reasonable have never had to be spelled out in statutory form. The limitations of technology reduced the capability to detect such uses. Now that the capability of detection is far greater, acts that were done in private spaces, that were once immune from the reach of litigation, are now discoverable. This requires a closer examination of perfect control over uses of works by creators.

that are not efficient in respect of society. The existence of a market failure is often used as a justification for government intervention: see Hugh Gravelle and Ray Rees, *Microeconomics* (Prentice Hall, 2004) 314. For example: parody is a market failure because the controllers of the goods, the copyright owners, have no incentive to allow others to parody their works thus disintegrating the fabric of the market, see: Robert Merges, "Are You Making Fun of Me: Notes on Market Failure and the Parody Defence in Copyright"(1993) 21 *American Intellectual Property Law Association Quarterly Journal* 305, 307. Thus government intervention, such as fair dealing legislation, is needed to overcome these resulting inefficiencies: see for example Alfred Yen "When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law, (1991) 62 *University of Colorado Law Review* 79.

⁸ Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York University Press, 2001) 177.

The limiting effect of fair dealing for Parody and Satire

15. Having fair dealing in terms of genre rather than a broader fair use regime requires judges to take on the role of literary critics. Judges are having to define the boundaries of genres that have long been the subject of debate in literary theory. Focusing on parody and satire, there is a discernible gap when it comes to literary theory definitions and legal definitions that leave the parodist in a state of uncertainty. In literary theory laughter and humour are not necessary ingredients to define a parody.⁹ Parody is often described as a meta-fictional mirror to the world that uses ironic inversion to comment on stylistic features of a previous work.¹⁰ The legal definition will more than likely be restricted to humour or displays of ridicule, ignoring a lot of literary theory that modern parodists may be interpreting their work by.¹¹ Without literary theoretical knowledge on the subject, and only relying on dictionary definitions,¹² many modern writing practices that are considered by literary theorists and artists as common practices of parody, may be left unprotected. When unprotected against litigation, the threat of suit might deter many creators from investing in this field. Parody and satire, in forms that are not outright funny or traditional, could be facing extinction. This definitional hurdle could be bypassed if the boundaries of the genre are not part of the legal inquiry.
16. These sorts of intellectual debates do not belong in the court room and miss the inescapable point; humour or not, a parody is fair because it has transformed a previous work into something new. This sort of transformation of cultural capital is important to society and to have uncertainty regarding its application can cause a deterrent effect that leaves all of society worse off.

Legal Definitions

17. There are relatively few cases that deal with defining parody under the fair dealing provisions in Australia. Parody is a firmly established genre within our literary tradition of ancient lineage.¹³ The incorporation of such an exception further strengthens the value of parody to

⁹ See Linda Hutcheon 'Parody without Ridicule: Observations on Modern Literary Parody' (1978) *Canadian Review of Comparative Literature* 201. For the purposes of these submissions I have kept the detail of the literary theory quite short and to the point but am happy to expand on this further if required.

¹⁰ See for example Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art forms* (Methuen, 1985) 34 and Margaret Rose, *Parody/Meta-Fiction: An Analysis of Parody as a Critical Mirror to the Writing and Reception of Fiction* (Croom Helm, 1979) 84.

¹¹ This is of course due to the limitations of dictionary or ordinary uses of words. See also the Canadian case of *CCH Canadian Ltd v Law Society of Upper Canada* [2004] SCC 13, 48 and below at Paragraph 19 of these submissions.

¹² For the problems with dictionary definitions see Conal Condren et al 'Defining parody and satire: Australian copyright law and its new exception' (2008) 13 *Media and Arts Law Review* 273, 286

¹³ For example: Aristotle parodied Aeschylus, Shakespeare parodied Marlowe, and Proust parodied Balzac.

society and the argument that such works do not seek to copy or steal from an original author but to transform the work into something new.

18. This can be seen by cases prior to the amendments such as in *Glyn v Western Feature Film Co*¹⁴ where Younger J explained in obiter that no infringement occurs because the mental labour involved in the revision and alteration of the source material produces an original result. This was confirmed by McNair J in *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd*¹⁵. In *Twentieth Century Fox Film Corporation v Anglo Amalgamated Film Distributers Ltd*¹⁶ and *United Feature Syndicate Inc. v Star Newspaper Pty Ltd*¹⁷ both parodies were held to be infringements due to the substantial amount taken from the original sources. In a more recent case of *Pokémon Company International, Inc. v Redbubble Ltd*¹⁸ the court focused on the purpose of the infringing articles holding that commercial exploitation and not parody was the ultimate aim.
19. Such focus avoided the courts dealing with the definition aspect of parody however cases from other jurisdictions with similar statutory exemptions show that humour or mockery must be apparent for a parody to be made out. For example, in Canada the court stated “parody must include some element of humour or mockery –if extended too far, what may be designed in jest as parody may simply become defamatory.”¹⁹ When Australian courts have the opportunity to look at defining the genre it is highly likely humour will form a core part despite its absence in literary theory. The second reading speech clearly shows that humour “Australia’s fine tradition of poking fun of itself”²⁰ is required. The natural and ordinary meaning as exposed by dictionary definitions similarly incorporates humour, mockery and ridicule.²¹
20. However literary theory, as demonstrated by scholars such as Hutcheon, Rose, Dentith, and Chambers²², show that humour is not a part of the parodic tradition. Breaking this down

¹⁴ [1916] 1 Ch. 261

¹⁵ [1960] 1 All ER 703, 708

¹⁶ (1965) 109 Sol. J. 107

¹⁷ (1980) E.I.F.

¹⁸ [2017] FCA 1541

¹⁹ *CCH Canadian Ltd v Law Society of Upper Canada* [2004] SCC 13, 48

²⁰ Chris Ellison. Commonwealth of Australia, *Parliamentary Debates*, 29 November 2006, No 14, 2006, 112.

²¹ See for example Foster J in *AGL Sydney Ltd v Shortland County Council* [1989] FCA 835 at 864 where the court immediately and exclusively looked at the *Concise Macquarie Dictionary* in order to define parody being “to imitate ... in such a way as to ridicule.”

²² See Linda Hutcheon, *A Theory of Art Forms: The Teachings of Twentieth-Century Art Forms* [1985] (Methuen, 2000) xiii, Robert Chambers, *Parody: The Art that plays with Art* (Peter Lang: Studies in Literary Criticism & Theory, Vol 21, 2010) 11, Simon Dentith, *Parody* (Routledge, 2000) 11, Margaret Rose,

further- while a parody might be humorous for a parody to be made out it must “mock” the original. The difference between parody and satire is that satire highlights folly in society generally while parody highlights limitations on the stylistic features of the source material.²³ A parody that criticises the stylistic features of a novel without humour, or with humour not directed at the earlier work, would not simply fall into the satire category unless it can be shown that the humour is a comment on society generally. The way the legal definition of parody is likely to be defined means even famous parodies such as *Ulysses* are unlikely to fit into the category.

21. A fair use doctrine rather than rigid categorisation of works moves the conversation from purpose to fairness.²⁴This is in line with the three step test under Article 9(2) of the *Berne Convention* that requires that “reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” It also removes this definition inquiry from the question allowing a more balanced approach to what would constitute a parody rather than constricting and deviating from what literary theorists have held to be a parody since at least 1984.²⁵
22. In addition, when it comes to moral rights it remains to be seen whether a work falling under a fair dealing exception would constitute ‘reasonable’ use under the corresponding provisions.²⁶ Having genre-based exceptions means Australia has the peculiar position where a parody or satire that is intended to hurt an author’s reputation may be protected as opposed to an innocent adaptation without such intention.
23. A broader perspective of “fair use” would therefore move the question away from genre categorising and would instead focus on the transformativeness of the derivative text. The courtroom is not the place to define categories of literary genres. Adopting a broad fair use exemption removes this inquisition into genre boundaries and moves to the very heart of why exceptions have always been seen as necessary in Copyright. By focusing on commercial harm

Parody/Meta-Fiction: An Analysis of Parody as a Critical Mirror to the Writing and Reception of Fiction (Croom Helm, 1979) 84

²³ *Campbell, aka Skywalker, et al. v. Acuff-Rose Music Inc.* (1994) 510 U. S. 569, *TCN Channel Nine Pty Ltd v Network Ten Ltd* (2001) 108 FCR 235

²⁴ As argued by Kimberlee Weatherall in Intellectual Property Research Institute of Australia and Centre for Media and Communications Law, *Response to the Issues Paper: Fair Use and Other Copyright Exceptions in the Digital Age*, (July 2005) 11.

²⁵ Fredrick Jameson ‘Postmodernism, or The Cultural Logic of Late Capitalism’ (1984) 1 *New Left Review* 146.

²⁶ See for example Maree Sainsbury ‘Parody, satire, honour and reputation: The interplay between economic and moral rights’ (2007) 18 *Australian Intellectual Property Journal* 149.

and transformativeness the question more sensibly restricts itself to 'fairness' leaving such literary debates to literature where they belong.

24. Should it be necessary, the writer would welcome the opportunity to expand upon these submissions. These views are my own and do not necessarily reflect those of Western Sydney University.

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