



INFORMATION SHEET

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Fair use: some myths and misconceptions

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In this information sheet, we discuss some common misconceptions about “fair use”, with particular emphasis on the fair use provision in the US Copyright Act. See also our information sheets *Access to copyright material in Australia & the US* and *Copyright reforms: Government’s May 2006 proposals* and our discussion paper *Fair Use: Issues & Perspectives*.

We update our information sheets from time to time. Check our website to make sure this is the most recent version.

Key points

- Australian copyright law allows “fair dealing” for certain purposes, such as research, criticism and reporting news.
- The US fair use provision has a broader, but less certain, application because it is not limited to use for particular purposes.
- The Australian government has considered whether Australia should change its Copyright Act so that it includes a fair use provision similar to that in the US Copyright Act. In May 2006, however, it decided not to do so.
- There are a number of myths and misconceptions about the concept of fair use and especially about the operation of the US fair use exception to copyright infringement. Some of these myths and misconceptions include that all personal use is fair use and free, that fair use balances extensions of copyright protection, and that fair use allows access to “locked” digital files.

Background

The Australian Government expressed its intention to consider the issue of copyright exceptions and the public’s access to copyright material in its 2004 election policy relating to the arts. In May 2005, the government released an issues paper *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other copyright exceptions in the Digital Age*, and called for submissions. The paper was said “to invite comment on whether the Copyright Act should include a general exception associated with principles of ‘fair use’ or specific exceptions which would facilitate the public’s access to copyright material in the digital environment”.

The government announced its intention to make some changes to Australian copyright law in relation to access to copyright material in May 2006, and aims to have draft legislation available for stakeholder comments in the second half of this year. The announced changes indicate that there will be an extension of the exceptions to copyright infringement, including the introduction of “flexible dealings” in certain circumstances. However, the government noted “Australia has a unique regime that should be maintained. In particular, stakeholders support the fair dealing regime and do not want to replace it with a US style fair use regime”.

Myths about US fair use

Myth 1: “Personal use = fair use”

In the US, not all personal uses are fair use, and some public uses are fair use.

The US Copyright Act lists purposes for which a fair use may be made. These include criticism, comment, news reporting and research. Unlike the position in Australia, however, the list is not “closed”, so a person can make a fair use for other purposes. US courts have held the following to be purposes for which a fair use can be made: parody, recording a television program for “time-shifting” purposes, and “intermediate” copying of a computer program to produce an interoperable product.

Whether or not a use is fair depends on four factors, listed in the US Copyright Act:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyright work;
- the amount and substantiality of the portion used in relation to the copyright work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

These are very similar to the factors for fair dealing under Australian legislation.

In particular, note that recording a television program to keep may not be fair use in the US.

Myth 2: “Personal use = free use”

Many countries – including the US – allow private copying, but have levies on recording media and/or equipment to compensate copyright owners.

Copying music for personal use may in some cases be fair use under US law, but is more likely to be covered by the home recording provisions. These provisions require the payment of a levy on digital recording media and equipment, which is paid to copyright owners. In some cases, some personal copying using media or equipment which is not subject to the levy is allowed: where it is analogue rather than digital, and where it isn’t covered by the complex definitions in the legislation.

Myth 3: “Fair use would counterbalance the extension of copyright protection”

On 1 January 2005, in Australia, the periods of copyright protection for most copyright material were extended. There was no revival of copyrights that had already expired. The extension resulted from the Australia US Free Trade Agreement (AUSFTA).

Some people have argued that fair use should be introduced to balance the extension of copyright protection, but they also want fair use to apply to material not affected by the extension, including recent material.

In fact, most copyright material used is recent material. Data collected by Copyright Agency Limited, for example, shows that 70% of works used by educational institutions are less than 10 years old, and that works whose author died 50 to 70 years ago make up only 0.02% of material copied.

Myth 4: “Fair use would give me access to a ‘locked’ digital file”

Australian copyright law prohibits the manufacture and supply of devices for circumventing technological protection measures (TPMs) – such as encryption and password protection for digital files – except for certain “permitted purposes”. These permitted purposes include copying and supply of material by libraries, copying and supply of material by educational institutions, use of material by governments, and certain activities relating to computer programs, including decompilation for interoperability.

As part of the AUSFTA, Australia has agreed to extend this prohibition, within two years, to prohibit people from circumventing a TPM to get access to a copyright work, and to limit the circumstances in which a circumvention device or service may be made or supplied.

Some people have argued that a fair use provision would limit the effect of a prohibition on circumventing an access control. US fair use, however, only applies to *accessible* material; it does not give a right of access to

inaccessible material – whether it is inaccessible because it is held by an individual, or in a private library, or because it is a digital file with a TPM.

Myth 5: “Educational institutions have fewer copyright restrictions in the US”

There may be greater scope for **free** copying in educational institutions in the US under the fair use defence, but the circumstances in which material may be copied without permission is much more limited. When comparing the provisions in Australia with those in the US, the more limited range of material available without permission, the uncertainty about what is covered and associated compliance costs, and the cost of getting clearances when fair use does not apply, must be taken into account.

Myth 6: “Libraries have fewer copyright restrictions in the US”

The Australian provisions for libraries are more certain than those in the US, and have wider scope in relation to digital material. In particular, the Australian provisions expressly allow for digital delivery of material to clients and other libraries. In addition, unlike the US, the Australian provisions allow supply of certain published material to other libraries for inclusion in their collections, including in digital form.

General myths

Myth 7: “Recording a television program is a criminal offence”

Recording a television program solely for personal use is not a criminal offence under the Australian Copyright Act. It is, however, at least until the government amends the Copyright Act, likely to infringe copyright, which (in theory) allows the copyright owner to take legal action. It is practically impossible, however, for copyright owners to know when and where their programs are being recorded.

Myth 8: “I can record a TV program because the TV station has paid a copyright fee”

A copyright work can be used in many different ways – for example, it can be copied, broadcast, put on a website and played in public. Each use generally requires permission from the copyright owners, and gives them an opportunity to negotiate payment. Payment for one use doesn't necessarily mean all subsequent uses have been paid for.

For example, a radio station which buys a CD needs to pay a broadcast fee to copyright owners to play the CD on the radio.

Similarly, educational institutions pay copyright fees to record television programs, even though the broadcasters have paid a fee to broadcast the programs.

Myth 9: “When you buy a CD you buy the copyright”

When you buy a CD, you don't get the copyright as well; that stays with the record companies, performers, music publishers and composers. You can play the CD in your home or your car, but if you want make a “copyright use” – such as making a copy of the CD or playing it to an audience – you generally need permission.

Myth 10: “I can buy a machine to copy music, so I must be allowed to use it to copy”

Machines which can be used to copy music and other copyright material can be sold because they can be used for legitimate purposes, even if they can also be used to infringe copyright.

Further information

For further information about copyright, and about our other publications and training program, see our website – <http://www.copyright.org.au>.

The purpose of this information sheet is to give general introductory information about copyright. If you need to know how the law applies in a particular situation, please get advice from a lawyer.

If you meet our eligibility guidelines, a Copyright Council lawyer may be able to give you free preliminary legal advice about an issue that is not addressed in an information sheet. This service is primarily for professional creators and arts organisations but is also available to staff of educational institutions, libraries and governments. For information about the service, see <http://www.copyright.org.au/advice> or our information sheet *Australian Copyright Council: who we are, what we do*.

Information from the Arts Law Centre of Australia may also be of interest to you: see <http://www.artslaw.com.au> or telephone (02) 9356 2566.

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Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



The Australian Copyright Council has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body, through its Policy, Communication and Planning Division.

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