

Copyright Exceptions: Fair Dealing and Fair Use in the Context of Cultural Institutions

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ABSTRACT

Unremunerated copyright exceptions vary within common law jurisdictions, ranging from general exceptions which can be invoked by a broad range of people in relation to a variety of activities (as exemplified by the US doctrine of fair use) through to specific exceptions which are limited in the individuals and acts to which they apply (such as the ‘libraries and archives provisions’ found in Australian, US, Canadian and UK law).

In Australia, exceptions in the *Copyright Act 1968 (Cth)* have varying degrees of specificity, with fair dealing available for limited purposes, and specific exceptions available to defined classes of users – such as the libraries and archives provisions. In recent times, there has been substantial debate about the possible amendment of exceptions due to perceived inadequacies in the existing law, with suggestions ranging from targeted amendments to current exceptions through to the introduction of a US-styled fair use provision. The addition of fair use may have the benefit of introducing a more flexible, technology-neutral exception which is more responsive to changing needs. On the other hand, real questions arise as to how Australian judges would interpret a fair use provision (or draw on US case law), and about the willingness of users to rely on a broad exception.

The authors examine these questions by reference to issues and needs in the cultural institution sector. They draw on empirical research on copyright, digitisation and cultural institutions that is being conducted by the University of Melbourne’s Centre for Media and Communications Law and Intellectual Property Research Institute of Australia. As part of that project, fieldwork has been conducted in Australian and overseas cultural institutions regarding digitisation practices and the application of existing copyright exceptions. The paper considers how cultural institutions understand and invoke exceptions, comparing institutions located within different jurisdictions. It then makes some conclusions in relation to how fair use might, and might not, be relevant to practices within Australian institutions.