

“Fair use” or misuse – free is not fair

US based big technology companies are lobbying the government to change Australia’s copyright law to introduce a US style “fair use” exception. Screenrights is opposing the introduction of fair use in Australia because it is not fair and it will not benefit Australia; it is merely another way for these multinational giants to avoid paying for copyright.

What is “fair use”?

In the US, there is a broadly worded free exception to copyright known as “fair use”. Whether a particular use of copyright is covered depends on a complex legal test which a court decides. In Australia (and the rest of the world with the exception of a few countries), we have a range of free exceptions for specific purposes such as reporting the news, criticism and review, study and research, and parody. Australia also has very broad paid exceptions for government use and education which provide the best access in the world.

Why is “fair use” being pushed?

The advocates of fair use point to the flexibility that it offers. Because fair use is not limited to specific purposes, it potentially provides a system that can accommodate new uses as they come up. Fair use campaigners claim that this would drive innovation and economic growth in Australia.

However, even pro fair use reviews of copyright have found no credible economic evidence for this claimed benefit. The Australian Law Reform Commission found that “the available economic evidence is incomplete and contested” and gave up on economics in favour of a “hypothesis drive approach”.¹ The Productivity Commission draft report discussed papers for and against the economic case but was unable to point to reliable evidence of the purported economic benefits of fair use.²

Fair use will drive up costs and reduce payments to creators

PwC calculated that the costs of fair use would be over \$1 billion per year in Australia.³ The costs relate to increased litigation, enforcement costs and increased transaction costs

If fair use is introduced, the big technology companies will gain because their licence fees are reduced which means creators lose out because they receive fewer royalties for their work. Ultimately all Australians will have less local content to enjoy as the incentives to produce content are undermined.

A better alternative to fair use

Copyright impacts a very broad cross-section of society on a daily basis – from creators, to consumers, to industry providers. It’s important to get the balance right. Australia has a long and proud history as a global leader in fair copyright exceptions that allow access to content for all of society. Screenrights has for many years worked with industry and user groups to improve our system through a range of reforms. Most recently, with Copyright Agency, the universities and schools and TAFEs representatives, we negotiated a comprehensive reform of the educational exceptions which the Government is looking to introduce. Screenrights strongly supports ongoing reform and improvement of our copyright laws through this consensus driven approach which has served us so well.

Ultimately, only licensing can cover all new uses of copyright and meet the needs of innovation in this world of technological change. A policy that provides for licences first with carefully crafted exceptions as a safety net is the best model for this new world.

For examples of fair use versus the Australian education licence system see over page

¹ “Copyright and the Digital Economy”, Australian Law Reform Commission, p21

² “Draft report into Australia’s Intellectual Property Arrangements”, Productivity Commission, p146

³ “Understanding the costs and benefits of a ‘fair use’ exception”, PwC, Feb 2016, https://www.screenrights.org/sites/default/files/uploads/PwC_Fair_Dealing_CBA_Final.pdf

Comparison of fair use with the Screenrights statutory licence for teaching

The Australian statutory licence system provides greater access to content for education, with fair payment to copyright owners, as shown by the table below.

Illustrative scenario (Based on the Productivity Commission Draft Report Table 5.2)	Australian statutory licence (paid) exception	US fair use
A teacher wants to record a specific TV or radio news program for use in class ⁴	✓	Possibly. This qualifies as fair use <u>only</u> if the source is a free-to-air broadcast and <u>only</u> for class room use during the first ten consecutive school days after the recording is made. ⁵
A school librarian wants to digitise the school's library of copies of television and radio and share it online with staff and students ⁶	✓	✗
A university wants to supply DVD copies of television programs to every student in a course ⁷	✓	✗
A teacher wants to access an online archive of 30,000 television programs available streamed on demand to students and teachers across the country ⁸	✓	✗
A school librarian wants to share copies of television over a peer-to-peer network allowing schools to upload copies of television and radio programs for download and use by other schools ⁹	✓	✗
A university researcher wants to find television news stories from an online archive of copies of every television news item in the past nine years indexed by story subject matter and viewable on demand by staff and students ¹⁰	✓	✗

More information

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⁴ This is the most basic day to day operation of the Screenrights administered statutory licence

⁵ Qualifies for fair use under the *Guidelines for Off-Air Recording of Broadcast Programming for educational Purposes* (which form part of US Congressional records)

⁶ DigitalVideoCommander is an Australian designed and manufactured audiovisual server created to provide this functionality for schools with a Screenrights licence.

⁷ An Australian university did precisely this in 2014, providing copies of television to thousands of students under the Screenrights licence

⁸ EnhanceTV offers an archive of over 30,000 copies of television programs with over 100 hours added each week from free to air and pay television

⁹ Clickview Exchange is a peer to peer system for librarians in schools and other institutions with a Screenrights licence

¹⁰ InfoRMIT News Media is an archive of thousands of television news and current affairs stories indexed by subject matter and available streamed on demand to students and staff