

# Fair use and section 200AB: what overseas experience teaches us about Australian copyright law

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**Abstract:**

*In December 2006, the Australian Copyright Act was amended to introduce a new exception for cultural institutions: section 200AB. This section adopts a far more open-ended drafting style than the existing libraries and archives provisions, and was introduced with the intention of capturing some of the benefits of a flexible exception. However, the operation of section 200AB has been a matter of much debate, because of uncertainties in its application. The aim of this paper is to explore how section 200AB can become a meaningful part of institutional copyright management. It includes discussion of fieldwork with US institutions about fair use practices, which may provide guidance to Australian counterparts.*

## Introduction

In late 2006, the federal government introduced a new exception into the *Copyright Act* to benefit cultural institutions<sup>i</sup> and other specified user groups: section 200AB. This exception marked a significant departure from the drafting style used in Australian copyright legislation dating back to 1912. Thus, while Australia had relied primarily on narrowly-drafted, closed-ended exceptions, as exemplified by the libraries and archives provisions, section 200AB was introduced with the intention of moving Australian law closer to the position in the United States, where users enjoy the benefits of an open-ended fair use exception (*Copyright Act of 1976*, § 107). However, there is a real risk that drafting choices in section 200AB, plus an understandable degree of risk aversion amongst cultural institutions, may limit the extent to which the sector will regularly and openly rely on the section. My interest is in exploring how we might escape this trap, and turn section 200AB into a meaningful instrument for cultural institutions.

To help identify possible strategies, this paper draws from both doctrinal analysis of section 200AB, and fieldwork at leading institutions in the US between November 2007 and May 2009.<sup>ii</sup> While the doctrinal analysis highlights some of the problems with section 200AB, the fieldwork reveals certain legal and non-legal factors that influence the (comparatively) aggressive approach taken to fair use by some US institutions. It will be suggested that with creative thinking and by refining their approach to copyright management, Australian cultural institutions may be able to realise some of the potential benefits of section 200AB.

## A short history of section 200AB

In order to analyse the drafting of section 200AB, it is useful to know something of its background and the reasoning for its introduction. In my view, this history suggests that the section is best seen as a legislative compromise between different viewpoints addressed to the Attorney-General's Department in its 2005 copyright exceptions review. In short, if you look at the arguments expressed by respondents, no-one was asking for section 200AB. This compromise may impact on the ability of section 200AB to achieve its goals, which included to 'provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties' (EM 2006, [6.53]) and to secure 'some of the benefits that the fair use doctrine provides in US law' (Attorney-General 2006).

## Origins of exceptions review

The impetus for the exceptions review came with implementation of copyright-related aspects of the US-Australia Free Trade Agreement (FTA) in 2004 (e.g., Burrell and Weatherall 2008, pp. 276-278). The FTA required a series of amendments to the *Copyright Act* relating to rights and enforcement mechanisms, such as a twenty year extension to the term of protection for published works (*FTA Implementation Act*, schedule 9, part 6). Relevantly for this paper, this was argued by some commentators and interest groups to have enlarged copyright protection without due consideration to the legal and economic framework of Australian copyright law, and

its differences with US law (summarised in JSCOT 2004, [16.35]-[16.50]; Senate Select Committee 2004, [3.93]-[3.126]). One such difference is the latter's open-ended fair use exception, which was said to give US users, consumers and new creators greater ability to utilise and transform copyright works than their Australian counterparts.

In order to take the heat out of this debate, the government committed in its 2004 re-election policy to hold a review asking whether a new exception based on fair use should be introduced into the *Copyright Act* (Liberal Party 2004, p. 22). The government was returned in October 2004, and the review commenced in May 2005. Respondents were invited to address two key questions. The first was whether the existing suite of exceptions were adequate in the digital age; that is, whether the *Copyright Act* needed to be reformed to permit additional acts of consumption and re-use of copyright material (Attorney-General's Department 2005, [11.1]-[11.21]). The second asked how any new exceptions should be drafted, including whether Australia should introduce a flexible, open-ended provision similar to fair use (Attorney-General's Department 2005, [1.1]-[1.7], [14.1]-[14.14]). While private copying was a particular focus of the Issues Paper, respondents were invited to raise other concerns. Submissions were received from a range of individuals and copyright stakeholders, and a number referred to problems facing cultural institutions and their users.

## Overview of US fair use doctrine

It is useful to briefly describe US law at this point. Like Australia, the relevant US statute, the *Copyright Act of 1976*, contains detailed, closed-ended exceptions, including sector-specific provisions for libraries and archives (§ 108). Section 108 is somewhat narrower than the equivalent Australian provisions, for instance because it cannot be invoked by museums and galleries. However, in section 107, there is an exception that does not contain *any* limitations based on purpose, user or subject-matter. Instead, section 107 states that:

the fair use of a copyrighted work ... for purposes *such as* criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. (my emphasis added)

The statute then sets out four factors to which a judge must have regard in determining whether a use is a fair use, which consider: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount taken; and (4) any current or potential market effect arising from the use. The US Supreme Court has said that fair use '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' (*Campbell v Acuff-Rose*, p. 577). Over the years, fair use has been successfully invoked by defendants to a wide variety of copyright proceedings. Only a handful of the reported cases involve cultural institutions; these largely relate to photocopying services provided in research and academic libraries (e.g., *Williams & Wilkins Co v United States*; *American Geophysical Union v Texaco*).

Some of the reasons why fair use might be attractive for countries like Australia were summed up by the late Justice Hugh Laddie, writing extrajudicially in 1996 in relation to United Kingdom copyright law. Having described fair use, he went on to say:

Compare that with our legislation. Rigidity is the rule. It is as if every tiny exception to the grasp of the copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls. This approach also assumes that Parliament can foresee, and therefore legislate for, all possible circumstances in which allowing copyright to be enforced would be unjustified. Based on this approach, we now have an Act in which there are 49 sections of numbingly detailed exceptions to copyright infringement (Laddie 1996, 258).

Similar themes appeared in a number of submissions to the 2005 exceptions review, with cultural institutions expressing fairly consistent support for Australia adopting a flexible exception based on fair use.<sup>iii</sup> For instance, the Australian Digital Alliance argued that such a provision would better facilitate case-by-case balancing of stakeholder interests, reduce the need for additional specific exceptions (and thus the complexity of the *Copyright Act*), and 'may encourage proper risk assessments rather than risk aversion which has become part of current industry practices' (2005, pp. 19-20). That said, other respondents were opposed to introducing fair use.<sup>iv</sup> For instance, the Australian Copyright Council argued that fair use 'is not justified in Australia, would not comply with the three-step test, and would introduce undesirable uncertainty into Australian law' (2005, p. 4). The Law Council of Australia raised similar concerns, questioning whether Australian judges would interpret fair use any differently to their analysis of fair dealing (2005, p. 12).

## The legislative response

The Australian government therefore had one batch of submissions arguing that the *Copyright Act* should be given a much-needed injection of flexibility to facilitate socially productive uses, and another saying that fair use would be intolerably uncertain and possibly place Australia in breach of its obligations under international copyright law.

Section 200AB straddled these positions. The government did not enact an open-ended fair use exception that was available to any user and not limited to specified purposes, but adopted what can be termed a hybrid approach (de Zwart 2007, p. 12). First, it targeted section 200AB to three user groups who described themselves as hamstrung by the rigidity and arbitrariness of the existing exceptions: cultural and educational institutions, and users assisting those with a disability. Others who might have claimed fair use (such as entrepreneurs, consumers and new creators) were left out, however there was some expansion to the closed-ended exceptions, including new exceptions for private copying (*Copyright Act*, ss. 43C, 109A, 110AA, 111) and an extension of fair dealing to include parody and satire (*Copyright Act*, ss. 41A, 103AA).

Second, the government placed some broad limits on permissible uses for which section 200AB may be claimed; in the case of cultural institutions, this was that the use:

- (a) is made by or on behalf of the body administering a library or archives; and
- (b) is made for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives); and
- (c) is not made partly for the purpose of the body obtaining a commercial advantage or profit (*Copyright Act*, s. 200AB(2)).

Finally, by using special language, the government was also able to respond to concerns that introducing fair use would place Australia in contravention of its obligations under the Trade-Related Aspects of Intellectual Property Agreement (TRIPS). The TRIPS Agreement is an international treaty that sets certain standards for the protection of intellectual property in member states. Article 13 relates to the drafting of exceptions, and states that:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

This text has come to be known as the ‘three-step test’, and similar language is found in other copyright treaties (e.g., Senftleben 2004). This language is reflected in section 200AB(1), which provides that:

The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist:

- (a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case;
- (b) the use is covered by subsection (2), (3) or (4);
- (c) the use does not conflict with a normal exploitation of the work or other subject-matter;
- (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.

Indeed, according to section 200AB(7), the underlined text has the ‘same meaning as in Article 13 of the TRIPS Agreement.’ However, there is vigorous disagreement among copyright experts regarding the interpretation of the three-step test. This makes it significant that the government avoided engaging with this debate by, in effect, downloading Australia’s compliance with international copyright law onto users and the courts.

So what does this drafting compromise mean for the operation of section 200AB? This paper will discuss two issues, first, comparing section 200AB with fair use, and second (and more briefly), commenting on the significance of using three-step test language in domestic legislation. It will then look to non-legal factors, and explore how copyright management strategies may facilitate reliance on section 200AB by Australian cultural institutions.

## Hybrid fair use

### Standards and rules analysis

One of the express intentions behind section 200AB was that it provide 'some of the benefits that the fair use doctrine provides in US law' (Attorney-General 2006). In order to recreate some of fair use's flexibility, the government therefore set out parameters within which a use must fall, but left the availability of the defence in any given circumstance to the judge hearing the dispute.

To understand the significance of this, we can draw from some of the literature on legal drafting, in which legal regulation can be roughly divided into two categories: standards and rules (e.g., Ehrlich and Posner 1974; Kaplow 1992).<sup>v</sup> Thus, imagine a model in which any law has two parts, namely a behaviour or circumstance (the trigger) and a consequence or regulation (the response) (Goebel 1992, p. 54). Many of the existing libraries and archives provisions are drafted as rules: they specify what activities cultural institutions may perform in relation to specified collection matter. The legal regulation has therefore been determined by the legislature *ex ante*, that is, *before* behaviour occurs. This is said to have the effect of: (i) limiting the discretion of judges (because certain legal consequences automatically follow once particular facts are present); and (ii) providing greater certainty to those subject to the law (because legal regulation is more prescriptive).

Rules are said to be more efficient than standards when there is a large body of homogenous behaviour, meaning that it is preferable for the legislature to set out the boundaries of permissible conduct, rather than leave this for individual court action. The position of library photocopying is a good example of this. By the middle part of the 20<sup>th</sup> century, there were debates about the legal ramifications of the photocopying revolution, including in relation to the use of such technologies in libraries (e.g., Spicer Report 1959, pp. 28-32; Franki Report 1976, pp. 9-43). In new copyright statutes passed around this time, the approach in Australia, the UK and the US was to permit some of these activities through sector-specific exceptions (e.g., Cornish 1976; Treece 1977). This was clearly motivated by the desire to provide certainty in relation to a widespread but legally questionable practice. There is some evidence that this has been successful; for instance, earlier fieldwork with Australian libraries suggested that while there are burdensome record-keeping requirements, librarians appeared comfortable with the steps required before published materials could be reproduced in accordance with long-standing user request and interlibrary loan exceptions (*Copyright Act*, ss. 49, 50; Hudson and Kenyon 2007, p. 38).

That said, because they can be prescriptive, rules risk arbitrariness, over and under-inclusiveness, and technological redundancy. In addition, it would be misleading to suggest that verbiage inevitably equates with certainty: the inclusion of ambiguous language in the Australian libraries and archives provisions demonstrates that, for rules, the devil really is in the detail. These drafting issues, together with the rapid pace of technological change, raise the question of whether it is viable for the government to retain a model in which detailed rules represent the default position for most copyright exceptions (summarised in Lindsay 2005, pp. 7-9). It is not surprising that there are many people who advocate increased flexibility of exceptions; that is, changes to make them more standard-like in their operation. As

an aside, it should be noted that this does not necessarily require fair use. For instance, the provision allowing cultural institutions to reproduce and internally communicate text-based and artistic works for 'administrative purposes' (*Copyright Act*, s 51A(2), (3)) embodies the clear but flexible concepts of care and control. Furthermore, it is possible to have both detailed *and* general exceptions in the one copyright statute, as seen in the US, and recommended by many of the proponents of fair use who contributed to the 2005 exceptions review.

To return to our two-part model, for legal regulation drafted as a standard, the legal response is determined by the adjudicator *ex post*, that is, *after* behaviour occurs. The legislature guides this process, for instance by setting an overarching benchmark, however the precise application of the law is left to the decision-maker. By arming adjudicators with greater discretion to make tailored decisions, standards are said to be more responsive to individual circumstances, changing norms and advances in technology. Standards are said to be desirable where behaviour is relatively heterogenous, making it difficult and costly for the legislature to predict, in advance, every permutation to which the law must respond.

In the case of cultural institutions, variation in collection genre, along with diversity in the use and availability of digital collections, may suggest that a fair use-style exception is desirable. The fact that the government developed section 200AB suggests that it found some of these arguments compelling. However, this flexibility can come at the expense of predictive value: users cannot achieve the same degree of confidence that a given legal consequence will flow from behaviour. This is particularly significant for the risk averse, who may adopt overly cautious interpretations of standards, and thus refrain from engaging in socially productive activities. Given that Australian institutions repeatedly describe their risk preferences as conservative (Hudson and Kenyon 2007, pp. 40-41), this raises the question of whether, and how, they will recalibrate their practices in response to section 200AB.

## **Fair use practices amongst leading US institutions**

To help answer this question, let us consider how leading US institutions deal with the uncertainty that is inherent in fair use, as revealed in the fieldwork I conducted with such institutions between 2007 and 2009. While there is variation in practices, one thing that struck me was that fair use repeatedly appears as a relevant rather than marginal component of copyright management. Part of the reason for this seems to relate to institutional norms regarding copyright and risk management (discussed later). However, another factor is that institutions do not act in an analytical vacuum, but draw from principles gleaned from the extensive fair use case law. That is, US courts have developed a substratum of explanatory statements that help give some rule-like guidance to the application of the fair use standard.

### **The breadth of fair use**

To illustrate the potential reach of fair use, consider the position of art museums. This group is particularly interesting because, first, the sector-specific exceptions in section 108 do not apply to them (elevating the significance of fair use) and second, they often collect works with very active rightsholders. While licensing is crucial for many activities (for both legal and relationship management reasons), the institutions

in this study also seemed to invoke fair use quite extensively, including within the following activities: collection management; preservation; running exhibitions and providing other forms of onsite digital access; preparing critical publications and exhibition brochures; providing images to the media for news reporting; and (more controversially) construction of certain websites and online tools.<sup>vi</sup> That is, institutions relied on licensing and (to greater and lesser degrees) fair use as a two-pronged approach to copyright compliance.

### **Online collection databases**

The type of reasoning invoked by US institutions can be illustrated by the example of online collection databases. Numerous participants in this research reported making small scale, low-resolution images of photographs and artworks available on such databases, with some institutions also making other collection genre available. Two key propositions were repeatedly identified by US interviewees in relation to fair use and those outputs – propositions grounded in the case law.

First, interviewees repeatedly observed that transformativeness is a key factor in fair use analysis: that is, that the institution's use is different from the original purpose for which the work was made. In the case of online collection databases, institutions say that such resources: (i) act as a reference aid to document the content of the collection; and/or (ii) facilitate research and education by users. The relevance of transformativeness took hold in the US following *Campbell v Acuff Rose* in 1994, in which the Supreme Court accepted the fair use defence advanced by musical act, 2 Live Crew, in relation to their parodic version of Roy Orbison's 'Oh Pretty Woman'. Importantly, analysis of subsequent case law suggests that when a court determines that a use is transformative, it is common for a defence of fair use to be upheld (see eg Beebe 2008). In the US interviews, three cases that were frequently cited by interviewees as influencing their online practices were *Kelly v Arriba Soft* and *Perfect 10 v Amazon* (which applied fair use to thumbnail images of photographic works generated by search engines) and the *Bill Graham Archives* case (in which a publisher was able, under fair use, to reproduce small scale images of concert posters and tickets in an annotated biography of The Grateful Dead). There has been criticism, however, that emphasising the role of transformativeness may unduly narrow fair use, in particular at the expense of literal forms of copying that have historically been viewed as within the doctrine's ambit (e.g., Tushnet 2004). One example from the US is teaching, which is referred to in the indicative list of fair use activities in section 107, and which commonly involves using copies for the exact purpose for which the original was created.

Secondly, a number of interviewees said that image size and resolution are both relevant when assessing the amount of a work that has been taken. As observed in the *Bill Graham Archives* case, even if an image reproduces the entire surface of a two dimensional artistic work, if that image is small, it may be insufficient to convey the artistic expression of the original. Institutions often constrain their fair use arguments to reproductions that have some limitation in the quality or amount of the original reproduced – that is, they say they use the minimum amount necessary to achieve their purposes. This may be through using low-resolution scans of photographs, or only providing an excerpt from an audio recording. Indeed, looking more broadly, there are other ways that institutions bolster their fair use claims, for

instance through including contextual material to emphasise the educational purpose of their use, or posting terms of use (or even using some form of access control) to dissuade re-use that falls outside of fair use.

It should be emphasised that these understandings are emerging. There are disagreements about the ambit of fair use, including within the cultural institution sector. It should also be noted that a number of institutions have been challenged by copyright owner representatives in relation to online activities. Some institutions have adopted what we might call a philosophically-grounded response (i.e., we want to protect fair use rights, and therefore do not pay, and will quarantine these activities from licensing negotiations so as not to create the perception of a market). Others, on the other hand, adopt a more commercially-oriented approach (i.e., let's cut a deal for a broader licence, bearing in mind that the price will have to reflect the value of our fair use rights). In both cases, even if there is no litigation (which is generally the case), these discussions demonstrate the institutions' forward-leaning approach to fair use, and may help generate sector-wide norms that may, in turn, make it more likely that the prevailing industry use will be considered fair.

## **Orphan works**

This comfort with fair use, even if only within conservative parameters, also seems to have an influence on the impact of orphan works: works for which the copyright owner is impossible to identify or locate. The fieldwork suggested that leading US institutions seem to have greater capacity to provide digital access to such materials than their Australian colleagues do. To be clear, this was not a fair use free-for-all: there were often limitations on resolution, size and accessibility, and notices for people who may have claims to such works. Nor is it to suggest that orphan works are not a problem for US institutions; a fair use analysis only permits so much activity, and may not produce a satisfactory answer for institutions with large numbers of orphan works or a greater aversion to risk. However, it does appear that for this sector, US institutions believe they have more scope to act than those in Australia, and that this cannot simply be put down to greater tolerance of the risk of resurfacing copyright owners.

## **Lessons**

The US experience suggests that the success of a flexible exception depends in part on its ability to generate judicially-adjudicated disputes, and in part on users being comfortable in developing their own norms and understandings *even in the absence of directly relevant case law*. In Australia, it is not clear how this body of case law will form. It has been just over three years since section 200AB was introduced, and there have been no reported cases. My impression is that many institutions either do not invoke section 200AB, or are cagey about explicitly declaring any reliance on the provision, fearing that if they put their head above the parapet they might get shot. 'We don't want to be the test case' seems to be a recurring fear in the sector. However, if we want section 200AB practices to develop, there will come a time when institutions need to take the leap to both rely on section 200AB, and stand behind their decision if challenged.

## The three-step test

It is beyond the scope of this paper to undertake a thorough analysis of the three-step test, and I only wish to add some brief thoughts. From the outset of the 2005 review, the government recognised that any new exceptions needed to comply with the three-step test (Attorney-General's Department 2005, [4.7]). Significantly, however, in section 200AB, three-step test language is used to assess the *use* and not the *exception*. This is an important and controversial change in the addressee of the three-step test from the government (as the body responsible for drafting exceptions) to users and ultimately the courts (Geiger 2007, pp. 488-490).

A number of challenges face these new addressees. In particular, the interpretation of the three-step test remains a matter of hot debate. Although three-step test language first appeared in international copyright law in 1967, it received little substantive attention in copyright jurisprudence until 2000 (Oliver 2002, pp. 119, 124). Some scholars have concluded that the scope of compliant exceptions is quantitatively and qualitatively narrow (e.g., Ricketson 2002), while others say that the three-step test should be afforded a more open-textured interpretation, giving member states leeway to craft exceptions to reflect local customs and norms (e.g., Geiger at all 2008). My own view is that the history and role of the three-step test suggest that the latter perspective is more compelling, as the test was originally intended to be sufficiently vague to cover the gamut of national exceptions that already existed in domestic laws (e.g., Senftleben 2004, pp. 50-52). However, it remains to be seen which interpretation would be preferred by an Australian judge hearing a case under section 200AB.

Importantly, then, by incorporating terminology which has the 'same meaning' as that in the three-step test (*Copyright Act* s 200AB(7)), the government has only made section 200AB all the more imponderable. It is one thing to introduce an exception based on decision-making factors rather than closed-ended elements, but quite another to base those factors on language that purports to (but does not) import established concepts from international law. This could have a chilling effect on users, who may feel uncomfortable in drawing analogies to principles in fair use and fair dealing jurisprudence, or in basing decisions on more intuitive understandings of the economic and non-economic interests of rightsholders and creators. Without further legislative reform, however, the inclusion of three-step test language will just need to be seen as part of the challenge of understanding and applying section 200AB.

## Replicating fair use

So far, we have seen that there are a number of issues with the way section 200AB is drafted, issues that could dissuade cultural institutions from taking full advantage of the provision. The challenge, therefore, is to make section 200AB a meaningful component of cultural institution practice despite these drafting issues. If this is to occur, we need to understand why fair use works for cultural institutions in the United States. I believe that this is not just because of how fair use is drafted, but also because of other legal, cultural and institutional factors. Thus, the debate needs to shift from what section 200AB or the three-step test says to also include

consideration of how extra-legal aspects of fair use practice can be replicated in Australia. I would like to offer some preliminary ideas in this respect.

First, reliance on a flexible copyright exception requires: individuals with the time and expertise to undertake the (often technical and nuanced) analysis that such provisions demand; and a management structure in which those individuals either have the authority to direct institutional decision-making or whose recommendations are acted upon by decision-makers. These two factors are the hallmark of US institutions that are at the forefront of sophisticated copyright practices: they put adequate resources into copyright management, and are receptive to new and innovative copyright policies. There are a variety of ways that similar results could be achieved in Australia, including through engaging in-house or external lawyers (whether individually or through a consortia), increasing the level of copyright training for staff, and adopting more centralised mechanisms for copyright management (which may promote consistency of practices across institutional departments, and help generate economies of scale due to the expertise developed by copyright officers).

Second, there may be a role to play for industry-negotiated guidelines. There has already been some movement in this direction, for instance with the handbook published by the Australian Libraries Copyright Committee and the Australian Digital Alliance (2008). Accepted minimum standards for section 200AB could also be developed by representatives of different sectors, for instance publishers, copyright collectives and cultural institutions. In the US, the CONTU Guidelines on Photocopying and Interlibrary Arrangements are an example of this (1975), and provide libraries with confidence that certain activities will not be challenged by certain copyright owners. As noted by Crews (1999), however, there can be difficulties in reaching consensus in multilateral negotiations where stakeholders have different views on the ambit of a flexible exception. To the extent that new unilateral standards are developed, it may be useful to consider more tailored policies, as seen by the success of the Documentary Filmmakers' Statement of Best Practices in Fair Use. Such publications could focus on particular collections or projects. A detailed industry protocol on acceptable section 200AB practices could also be underpinned by a fighting fund for any institution that is challenged for an activity within their parameters.

Finally, the more the government builds flexibility into exceptions, the less workable a cautious attitude to risk management becomes. US institutions that invoke fair use in emerging situations expect and are comfortable with disagreement about their practices. While they want to have confidence that their interpretations are defensible, they do not seem to be hung up about achieving certainty. They are also less likely to adopt a binary understanding of copyright exceptions in which activities are understood as either definitely in, or definitely out, of an exception. In short, they accept that copyright owners and users face risk and uncertainty, and this needs to be factored into copyright management, fair use practices, and licence negotiations.

## Conclusion

The US case law illustrates some arguments that Australian cultural institutions could draw from when developing section 200AB practices. However, the US experience is more than just its fair use jurisprudence: it includes other legal and non-legal factors that influence the relatively important role that the exception plays in cultural institution practices. By understanding the academic literature on legal drafting, and the real-life perspectives of Australian and US institutions, we are in the best position to make some headway in turning section 200AB into a similarly prominent part of copyright management in Australia. In my view, one of the first things we need to do is reframe the dialogue surrounding section 200AB as not just about technical legal questions, but one which challenges the decision-making structures that exist within and between institutions. This includes considering the motivations and experiences of creators, how markets for copyright works operate, the role that cultural institutions play in collecting and distributing such works, and the reasons why we have free exceptions that interfere with the market. It may also require institutions to develop structures to manage copyright more pro-actively, not only for exceptions like section 200AB, but in relation to licensing practices and their own intellectual property.

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## End-Notes

<sup>i</sup> Section 200AB applies to ‘libraries and archives’. The term library is not defined in the *Copyright Act*, and the common understanding would apply. In contrast, archives is given a definition broader than general usage; it includes *any* institution that maintains custody of a historically or socially significant collection for the purpose of conservation and preservation (*Copyright Act*, s. 10(4)). The Act states that ‘museums and galleries are examples of bodies that could have collections covered by ... the definition of **archives**.’

<sup>ii</sup> In the US, interviews were conducted at 22 cultural institutions and 7 other peak bodies, with a total of 55 interviewees participating in the research. Institutions were typically large institutions located in major cities, as these institutions are most likely to play a leading role in setting policy in the sector. Interviewees were generally staff whose responsibilities included managing copyright and setting copyright policy. The interviews typically lasted between 60 and 120 minutes, and revolved around a semi-structured series of questions designed to elicit information about copyright management and decision-making. Similar interviews were also completed with Canadian interviewees between April 2008 and April 2009.

<sup>iii</sup> The Attorney-General’s department received 161 submissions in its review; most are available at

[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_Copyright-ReviewofFairUseExemption-May2005](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExemption-May2005) (last visited 5 October 2009). Key cultural institution submissions that supported a fair use-style exception were: Australian Digital Alliance, pp. 19-21; Australian Society of Archivists, p. 3; CICI, pp. 13-14 (member institutions listed as endorsing the submission were the Australian Institute of Aboriginal and Torres Strait Islander Studies (Library), Australian War Memorial, National Archives of Australia and National Gallery of Australia: pp. 2-3); and Library

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Copyright Alliance, pp. 1-4 (an alliance of five library associations in the US). A notable exception to this was the Australian Film Commission: pp. 24-25.

<sup>iv</sup> See eg the submissions from: Arts Law Centre of Australia, pp. 3-5; Copyright Agency Limited, pp. 3-4, 11-13; Music Council of Australia, pp. 1-3; National Association for the Visual Arts, pp. 1-5; Network Ten, p. 3; Viscopy, pp. 3-5.

<sup>v</sup> Space does not permit a detailed elaboration of the standards and rules model, but a few caveats should be noted. First, the roughness of the division must be emphasised: indeed, it is more accurate to think of a drafting spectrum, in which we observe rule-like and standard-like qualities of legal regulation. Second, many other factors influence the interpretation of law and the behaviour of institutions. In this paper, we will see examples in relation to risk aversion and the resources given to copyright management. However, the standards and rules literature provides some useful insights to help explore the benefits and disadvantages of adopting a fair use model.

<sup>vi</sup> This list is intended to give an indication of the range of activities for which interviewees reported relying on fair use. Other factors aside from the purpose of the use were relevant to these determinations, such as the nature of the copied works, the size or resolution of images, and their location or prominence in hard copy publications.