

## The Copyright Tribunal as exception-maker: are both flexibility and certainty achievable?

David J Brennan\*

This article proposes an approach to address the current fair use impasse in Australia. This is by the conferral of delegated legislative power upon the Copyright Tribunal of Australia for it to periodically determine new public interest exceptions. The reform would require, for separation of powers reasons, that the Tribunal be reconstituted to perform such a legislative function. The proposal is one that navigates a course between the current law and the open slather adoption of US-style fair use recommended by the ALRC by creating a public interest rule-making power within an existing Australian copyright institution. It is also proposed to use as the vehicle for the delegation of power an overhauled section 200AB, so that the three-step test no longer nakedly applies in domestic law, but instead operates as criteria to inform the legislative choices of the Tribunal.

### Introduction

In international copyright law, the minimum standards of rights holder protection are set by treaty and extended by national treatment principles. Exceptions to those protections are not typically required by treaty, but are permitted *ad hoc* in each member state subject to treaty obligations designed to ensure the protections in any copyright territory are not hollowed-out by that member state's exceptions.<sup>1</sup> In other words, the minimum treaty standards for rights are essentially global, whereas permissible exceptions to rights are essentially local within certain treaty restrictions. The cardinal restriction on national copyright exceptions since the formation of the World Trade Organization in the mid-1990s is the three-step test. This test, first devised at the 1967 Stockholm revision to the Berne Convention as a limit upon exceptions to the reproduction right, provides in its TRIPS article 13 formulation that: 'Members shall confine limitations and 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 rights holder'.<sup>2</sup> Thus, the three steps are (1) the exception is a special case; (2) the

---

\* Visiting Fellow, Faculty of Law, University of Technology, Sydney. I thank Emily Hudson, Peter Heerey, Jane Ginsburg, Sam Ricketson, Janice Luck, David Lindsay and James Stellios for their comments on an earlier draft; all responsibility for the analysis rests with me.

<sup>1</sup> See generally: Paul Goldstein and P Bernt Hugenholtz, *International Copyright Principles, Law, and Practice* (OUP 3<sup>rd</sup> ed, 2012), chs 3 and 11.

<sup>2</sup> TRIPS is a well-known acronym for the Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C. A 2000 World Trade Organization Panel decision considered that a permissible minor exception to a Berne article right is any free of charge exception that passes the TRIPS article 13 three-step test: World Trade Organization, United States – Section 110(5) of the US *Copyright Act*, Report of the Panel, WT/DS160/R, 15 June 2000, [6.71]-[6.82]. As to the origins of the test in article 9(2) of the Berne Convention: World Intellectual Property Organization (WIPO), *Records of the Intellectual Property Conference of Stockholm*, 11 June – 14 July 1967, Report on the Work of Main Committee, 1144-1146. For an authoritative treatment of the three-step test in both its Berne and TRIPS contexts: Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* 2<sup>nd</sup> ed (Oxford, 2005), volume 1 [13.03]-[13.31] (Berne Convention) and [13.94]-[13.115] (TRIPS).

exception is not incompatible with uses typically permitted by rights holders; and, (3) prejudicial effects of the exception on rights holders are not inordinate.

Since the 1998 recommendation of the (now-defunct) Copyright Law Review Committee (CLRC) to expand 'fair dealing to an open-ended model', there have been calls for the adoption of US-style fair use in Australian copyright law.<sup>3</sup> To date these have reached two crescendos. One was at around the time of the 2004 Australia-US Free Trade Agreement (AUSFTA) and the related report by the Australian Parliament's Joint Standing Committee on Treaties.<sup>4</sup> The other was the 2013 recommendation of the Australian Law Reform Committee (ALRC) that the *Copyright Act 1968* (Cth) 'should provide an exception for fair use' – subsequently supported by an Ernst & Young Cost-Benefit Analysis and a Productivity Commission Inquiry Report.<sup>5</sup> To the Productivity Commission's endorsement of this ALRC fair use recommendation, the current Australian government responded in 2017 with a stated intention to consult further:

The Government's aim is to create a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes. There are arguments that Australia's current exceptions for fair dealing are restrictive when compared with international counterparts and may not permit some reasonable fair uses of copyright material. However, this is a complex issue and there are different approaches available to address it.<sup>6</sup>

The government's consultative process is scheduled to commence in 2018.

Australian copyright exceptions can be classified as belonging to one of three types. The broadest in terms of nature, scope and availability are the fair dealing exceptions.<sup>7</sup> They are without-charge or free. They can be availed of by any person who wishes to exploit copyright for one of the designated purposes: research, study, criticism, review, news reporting, parody, satire, the giving of legal professional advice and the recently-introduced purpose of facilitating access for those with disabilities. The second are more specific without-charge exceptions which target: specific categories of copyright subject matter (e.g. artistic works); specific classes of copyright use (e.g. time shifting); or, specific

---

<sup>3</sup> Copyright Law Review Committee, *Simplification of the Copyright Act 1968 – Part 1: Exception to the Exclusive Rights of Copyright Owners* (Attorney's General Department, 1998), [2.03].

<sup>4</sup> Joint Standing Committee on Treaties, *Report 61: Australia - United States Free Trade Agreement* (Parliament of the Commonwealth of Australia, June 2004), 240 "Recommendation 17: The Committee recommends that the changes being made in respect of the Copyright Act 1968 replace the Australian doctrine of fair dealing for a doctrine that resembles the United States' open-ended defence of fair use, to counter the effects of the extension of copyright protection and to correct the legal anomaly of time-shifting and space-shifting that is currently absent."

<sup>5</sup> ALRC, *Copyright and the Digital Economy – Final Report* (November 2013), 13 Recommendation 4-1; Ernest & Young, *Cost benefit analysis of changes to the Copyright Act 1968* (2016), x "the ALRC's proposed recommendations should be beneficial, albeit not substantially in some areas. From the standpoint of an 'open-ended' (fair use) or 'closed-ended' (fair dealing) system of exceptions, the former is likely to have the largest net benefit."; Productivity Commission, *Inquiry Report: Intellectual Property Arrangements* (2016), 193 "Recommendation 6.1: The Australian Government should accept and implement the Australian Law Reform Commission's final recommendations regarding a fair use exception in Australia."

<sup>6</sup> *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements* (August 2017), 7.

<sup>7</sup> Copyright Act 1968 (Cth), ss 40-43, 103A-104, 112, and 113E.

classes of copyright users (e.g. libraries and archives).<sup>8</sup> The third type are remunerated exceptions which relate to aspects of educational use, governmental use, the retransmission of broadcasts, the sound recording of musical works, and, the public performance or broadcasting of sound recordings.<sup>9</sup> The 2013 ALRC recommendation entailed supplanting the first type of exception with US-style fair use, an open-ended exception guided by an illustrative list of purposes and criteria, for that fair use exception to also supplant many of the second type of specific without-charge exceptions and to override the educational and governmental remunerated exceptions in areas of overlap.<sup>10</sup>

Those advocating fair use depict the current regime of Australian copyright exceptions as too rigid.<sup>11</sup> This argument is put by comparing the Australian regime to its US counterpart. These advocates typically depict the US system as limber and nimble because the fair use exception can be judicially stretched to fill gaps.<sup>12</sup> They argue that technology is making possible too many new uses of copyright to be accommodated by closed-list statutory text. Furthermore, some copyright users have a financial interest to advocate for a fair use exception that might convert some of their paid-for uses into without-charge uses.<sup>13</sup> Those resisting fair use reforms distinguish the small Australian copyright jurisdiction from the large US one, and point out that each jurisdiction is situated in quite different civil litigation and constitutional traditions.<sup>14</sup> The contrast leads to the basic point that Australia is unlikely to arrive at a critical mass of fair use copyright jurisprudence. Cases will be sparse and incapable of producing a cohesive, overarching framework to explicate the operation of an open-ended Australian fair use exception. It may be decades, if ever, until High Court authority emerges. Lacking a body of case law, an Australian open-ended exception will be a source of uncertainty. Producers and creators in copyright-dependant industries see that uncertainty as an economic threat.<sup>15</sup>

---

<sup>8</sup> Copyright Act 1968 (Cth), Part III, Divisions 7 and 8 (artistic works); s 111 (time shifting); Part III Division 5 and Part IVA Division 3 (libraries and archives).

<sup>9</sup> Copyright Act 1968 (Cth), Part IVA, Division 4 (educational statutory licence); Part VII Division 2 (government use statutory licence); Part VC (retransmission); Part III, Division 6 (recording of musical works); ss 108-109 (public performance and broadcasting of sound recordings)

<sup>10</sup> ALRC above note 5, 14-15 Recommendations 5-4 and 8-1.

<sup>11</sup> ALRC above note 5, [4.44]-[4.47] and [4.53] where the ALRC's Report provides a summary of various submissions making this argument.

<sup>12</sup> For example, ALRC above note 5, [4.44] where Choice (formerly the Australasian Consumers' Association) is quoted as submitting: 'Fair use is best equipped to address use of works on social media precisely because it is so nuanced.'

<sup>13</sup> Copyright Advisory Group – Schools of the Standing Council on School Education and Early Childhood (CAG), *Submission to ALRC Issues Paper 42: Copyright and the Digital Economy* (November 2012), 67: 'Australian educational institutions also pay for many uses that are free for education in comparable jurisdictions.'

<sup>14</sup> Australian Copyright Council, *Submission to the Australian Law Reform Commission Copyright and the Digital Economy Issues Paper November 2012*, 12-16.

<sup>15</sup> Motion Picture Association of America, *Submission in response to the ALRC's Issues Paper 42: Copyright and the Digital Economy* (November 2012), 7 explaining the deleterious effects of fair use in Australia: 'Since it is inconceivable that, as part of any new system of copyright exceptions in Australia, its courts would be directed to slavishly follow U.S. precedent, it is inescapable that there would be considerable uncertainty about the resolution of claims based on the new system in Australian courts'. Similar concerns have been expressed by the Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement* (September 2000), 129 stating about the 1998 CLRC proposal, that: 'Because they are relatively open-ended, the factors recommended by the CLRC will require careful judicial construction. The Committee does not believe that offsetting benefits have been identified to justify bearing the costs and

As mentioned above, the other recent occasion when US fair use was advocated in Australia occurred in the wake of the 2004 AUSFTA. This advocacy was very much by way of a reaction to what were considered copyright-maximalist aspects of the AUSFTA. These included the US exporting aspects of its copyright law relating to: longer terms of protection; storage within random access memory comprising an aspect of the reproduction right; and, liability for circumventing technical access controls.<sup>16</sup> The AUSFTA's copyright impacts were said to require a rebalancing which, some argued, could be achieved by Australia importing the US fair use regime.<sup>17</sup> The argument was not accepted by the Australian government of the day – a non-acceptance which provides some context to a subsequent government including in its reference to the ALRC 'whether further exceptions should recognise fair use of copyright material'.<sup>18</sup> Instead, in 2006 section 200AB was enacted to respond to the demands being made then for an Australian fair use exception.<sup>19</sup> Section 200AB is a remarkable provision and there are few, if any, who consider the exception to be fit for purpose.<sup>20</sup> Today it provides a type of backstop exception to benefit libraries, archives and educational institutions.<sup>21</sup> However, to meet right holder concerns about compliance with the three-step test, the provision inscribes three-step test language as the criteria for its operation. The operation of the exception is essentially defined by uses that fall within the treaty norm of the three-step test.

The aim of this article is to propose a reform pathway well-suited to Australian conditions. The proposal is to confer a delegated legislative power upon the Copyright Tribunal of Australia for it to periodically determine new public interest exceptions. As will be explained, this reform would also require for separation of powers reasons, that the Tribunal be reconstituted to perform such a legislative function. Thus, the proposal is one that navigates a course between the current law and the open slather adoption of US-style fair use recommended by the ALRC. It would do so by creating a public interest rule-making power within an existing Australian copyright institution. It is also proposed to use as the vehicle for the delegation of power an overhauled section 200AB, so that the three-step test no longer

---

uncertainties this entails. More generally, we believe that the current arrangements reduce the transaction costs involved in operating the copyright system, and make for enhanced efficiencies.'

<sup>16</sup> AUSFTA, art 17.4 (1), (4), (7) and (8).

<sup>17</sup> Joint Standing Committee on Treaties above note 4, 237 quoting the Matthew Rimmer submission that Australia has: 'adopted all the harsher measures of the Sonny Bono Copyright Term Extension Act and the Digital Millennium Copyright Act without any of the good features of the United States regime'. Rimmer's perspective would undoubtedly include fair use within the so-called 'good features of the United States regime'.

<sup>18</sup> ALRC above note 5, 7.

<sup>19</sup> Copyright Act 1968 (Cth), s 200AB. House of Representatives Hansard, Copyright Amendment Bill 2006, Second Reading Speech, 19 October 2006, Attorney-General Ruddock: 'There are also new exceptions to provide flexibility to allow copyright material to be used for certain socially useful purposes, where this does not significantly harm the interests of copyright owners. The bill also provides for an exception to allow cultural and educational institutions and certain individuals to make use of copyright where that use does not undermine the copyright owner's normal market. This will provide some of the benefits that the fair use doctrine provides in the United States under their law.'

<sup>20</sup> Emily Hudson, 'Implementing Fair Use in Copyright Law: Lessons from Australia' (2013) 25 *Intellectual Property Journal* 201, 222-228.

<sup>21</sup> With the insertion in 2017 of a new fair dealing purpose (in section 113E) of access by persons with a disability, the section 200AB purpose (in section 200AB(4)) of use by or for a person with a disability was repealed: Copyright Amendment (Disability Access and Other Measures) Act 2017 (Cth), sch 1 pt 1 item 2 and sch 1 pt 2 item 56.

nakedly applies in domestic law, but instead operates as criteria to inform the legislative choices of the Tribunal.

### **Navigating between standards and rules**

Law and economics literature draws a distinction between two regulatory settings. In one, 'rules', effort is undertaken to give detailed content to law prior to the occurrence of conduct intended to be governed. In the other, 'standards', no such *ex ante* effort occurs. Rather, under broad principles any detailed content of the law is effectively determined *ex post*, after the occurrence of relevant conduct, by the precedential effect of judicial decisions.<sup>22</sup>

Kaplow, in an influential article that has framed what is now a mainstream economic analysis, gives insight into the choice between rules-based or standards-based law.<sup>23</sup> A rules system will be optimal if a law is to govern frequently occurring and homogenous conduct; the one-off *ex ante* cost of designing the rules 'are likely to be exceeded by the savings realized each time the rule is applied'.<sup>24</sup> This is because the alternative, a standards system: (i) required costly and frequent litigation for any precedent-generated rules to emerge; and (ii) many who contemplate the scope of a standard's potential operation to their circumstances will, because of the standard's lower predictive certainty, find it difficult and costly to comply. This will often entail legal advice, or running the gauntlet of possible non-compliance, or both. Kaplow concluded that when the conduct made subject to the relevant law is frequent and homogenous, 'standards tend to be costlier and result in behaviour that conforms less well to underlying norms'.<sup>25</sup> Conversely standards are likely to be preferable if the targeted conduct is infrequent, highly variable and unpredictable. For sparse and unusual conduct, 'determining the appropriate content of the law for all such contingencies would be expensive, and most of the expense would be wasted', and only then is it better to adopt a standard for application if that conduct arises.<sup>26</sup>

Kaplow's analysis might lead policy-makers away from the ALRC's suggested fair use reform. The ALRC explains its fair use proposal as 'a broad standard that incorporates principles, rather than a detailed prescriptive rule'.<sup>27</sup> However, fair use is an exception that would apply to the primary economic rights attached to all copyright subject matter recognised under Australian law, and would cater to a vast array of copyright uses occurring in Australia by individuals and companies. On any view, it is law that is intended to govern (using the language of Kaplow) frequently occurring conduct. Also, the conduct governed is homogenous insofar as it must comprise one or more of the finite exclusive rights attached

---

<sup>22</sup> Hudson above note 20, 211-221.

<sup>23</sup> Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 *Duke Law Journal* 557. For example a 2017 US corporate law text book when citing Kaplow's article refers to it as 'the canonical comparison of the merits of rules and standards as regulatory techniques': Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* 3<sup>rd</sup> ed (Oxford, 2017), 32 n15.

<sup>24</sup> Kaplow above note 23, 621.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 621-622. In the Australian setting it is instructive to consider the legal response to the introduction by section 52 of the Trade Practices Act 1974 (Cth) of a legal standard applying to a broad range of commercial conduct. After a hiatus in which the provision was not pleaded, the default position was ultimately to fall back upon more detailed rules found in other causes of action (such as the tort of passing off) or grounds of contractual rescission (such as misrepresentation) to supply operative legal rules.

<sup>27</sup> ALRC above note 5, 22.

to recognised copyright subject-matter.<sup>28</sup> Kaplow's analysis suggests that a standard-based approach in such a setting will entail high social cost in terms of uncertainty, legal fees and poor compliance with legal norms.

The Australian reform proposal of the ALRC is modelled on the US fair use exception. Compared to the US, the Australian jurisdiction is one in which copyright litigation is infrequent, and in which there are few constitutional principles for guidance. For example, the High Court of Australia has to date not had reason to substantively consider a fair dealing exception. Hunter – an Australian law academic who has taught in the US – describes this contrast in the following terms:

[T]here is a golden thread that runs through much of US fair use – speech rights – and the protection of multiple avenues of speech explains a significant number of US cases. Australia does not have either of the two features that characterise the US system: that is, it does not have the same commitment to speech rights and it does not have a large number of court decisions from which one can derive patterns and rules. This means that ... in Australia there will still be a much broader area of penumbral uncertainty than exists within the US.<sup>29</sup>

In mounting its case for fair use, the ALRC's consideration of whether a fair use 'standard' was preferable to existing fair dealing 'rules' did not focus on any detailed economic analysis of the proposed law.<sup>30</sup> Kaplow's analysis is not cited. To the extent these matters were considered relevant to the ALRC, the social costs of an uncertain fair use standard were regarded as an acceptable price to pay for flexibility. The driver of the ALRC's reform proposal was a stated desire for a flexible free exception regime: 'law that incorporates principles or standards is generally more flexible than prescriptive rules, and can adapt to new technologies and services'.<sup>31</sup>

From the failure to readily adopt the ALRC's fair use proposal – the support of Ernst & Young and the Productivity Commission notwithstanding – the Australian government seems unpersuaded that the social costs of an uncertain standard justify the benefits of flexibility. Indeed, implicit in the government's response to the proposal is the underlying question: can flexibility be achieved in an alternative way, without imposing so heavily the costs of uncertainty upon Australian society and industry? To that question, this article explains how the vesting of relevant legislative (rule-making) power in a reconstituted Copyright Tribunal of Australia might offer a pathway well-suited to Australian conditions.

---

<sup>28</sup> In this regard the conduct being regulated is like an example offered by Kaplow above note 23, 563: 'To illustrate the analysis, consider the problem of regulating the disposal of hazardous substances. For chemicals used frequently in settings with common characteristics – such as dry cleaning and automotive fluids – a rule will tend to be desirable.'

<sup>29</sup> Dan Hunter, 'American lessons: Implementing fair use in Australia' (2014) 24 *Australian Intellectual Property Journal* 192, 194. A leading US copyright law treatise writer has described US fair use as having predictive certainty akin to a 'fairy tale': David Nimmer, "'Fairest of Them All" and other Fairy Tales of Fair Use' (2003) 66 *Law & Contemporary Problems* 263, 287. Contrary to Nimmer's perspective at least two scholars have, on the basis of empirical analysis, mounted an argument that the unpredictability of fair use can overstated: Barton Beebe, 'An empirical study of U.S. copyright fair use opinions, 1978 – 2005' (2008) 156 *University of Pennsylvania Law Review* 549 and Matthew Sag, 'Predicting fair use' (2012) 73 *Ohio State Law Journal* 47.

<sup>30</sup> ALRC above note 5, 21. A consequence of the ALRC's choice to avoid economic analysis was the Australian government commissioning a cost-benefit analysis: Ernst & Young above note 5.

<sup>31</sup> ALRC above note 5, 22.

### Consideration of the regulatory solution

By an enactment of 2007 Israel appears to have pioneered the vesting of regulatory power to create exceptions to the primary economic rights of copyright: '[The relevant minister] may make regulations prescribing conditions under which a use shall be deemed a fair use'.<sup>32</sup> While it seems that no regulations have been made under the Israeli provision, some of the possibilities created by it received scrutiny during the ALRC inquiry.<sup>33</sup> It was apparently brought to the attention of the ALRC by a November 2012 submission of the Copyright Advisory Group of the Standing Council on School Education and Early Childhood (CAG): 'This is an interesting model which could be explored as a way of balancing the interests of flexibility and certainty often raised by commentators as the policy trade off to be made between a *fair use* and *fair dealing* system'.<sup>34</sup> In its subsequent Discussion Paper the ALRC observed that the CAG submission 'suggested that a degree of certainty may be attained in other ways, including drawing upon the Israeli model of deeming certain uses as fair *ex ante* — that is, before the event'.<sup>35</sup> The possibilities implicit in the Israeli regulatory power then attracted the support of both the Pirate Party<sup>36</sup> and the Cyberspace Law and Policy Community, the latter submitting: 'Not only would regulations be able to add new general categories of illustrative purposes, but, being more easily amended than legislation, could also incorporate technology-specific illustrative purposes where that was felt desirable'.<sup>37</sup> Ultimately the idea of a type of fair use regulatory power was discarded by the ALRC, consigned to a mere footnote in the final report.<sup>38</sup> However it provides a kernel for the reform suggestion that follows — although empowering the Copyright Tribunal of Australia to be the maker of such regulations was not suggested to the ALRC.

A more established precedent for the reform here proposed are the delegated legislative powers conferred in US law under some of the 1998 reforms of the *Digital Millennium Copyright Act* (DMCA).<sup>39</sup> These provided for the grant of rulemaking authority to the Librarian of Congress, in consultation with the Copyright Office and Department of Commerce, to declare exemptions from the prohibition on the circumvention of access controls. Such exemptions may be made if the Librarian finds that particular users are 'adversely affected by the prohibition ... in their ability to make noninfringing uses of a

---

<sup>32</sup> *Copyright Act 2007* (Israel), s 19(c) which is discussed in Jason Mazzone, 'Administering Fair Use' (2009) 51 *William and Mary Law Review* 395, 414. The provision was inserted into Israeli law at the time of introducing fair use 'in order to increase certainty, the Minister of Justice would be authorized under the law to publish regulations clarifying which acts are regarded as fair': Amira Dotan et al, 'Fair Use Best Practices for Higher Education Institutions: The Israeli Experience', (2010) 57 *Journal of the Copyright Society Of The USA* 447, 461 note 55.

<sup>33</sup> Lital Helman, 'Fair Use and Other Exceptions' (2017) 40 *Columbia Journal of Law & the Arts* 395, 398: 'Section 19(c) is yet to be used by the regulator'.

<sup>34</sup> CAG above note 13, 107.

<sup>35</sup> ALRC, *Copyright and the Digital Economy – Discussion Paper 79* (May 2013), [4.169].

<sup>36</sup> Pirate Party Australia, *Submission on ALRC Discussion Paper 79 Copyright and the Digital Economy* (May 2013), 7.

<sup>37</sup> Cyberspace Law and Policy Community, *Submission on ALRC Copyright and the Digital Economy Discussion Paper 79* (May 2013), 1.

<sup>38</sup> ALRC above note 5, 146, n153.

<sup>39</sup> The DMCA reforms relating to circumvention comprises *Copyright Act 1976* (US), chapter 12, the contours of which were exported to Australia: AUSFTA, art 17.4 (7) and (8). The specific rule-making provisions are *Copyright Act 1976* (US), §1201(a)(1)(B) and (C). See also the discussion in Julie E Cohen et al, *Copyright in a Global Information Economy* 3<sup>rd</sup> ed (Wolters Kluwer, 2010), 676-677.

particular class of copyrights works'.<sup>40</sup> After the initial rulemaking – which occurred in 2000 upon the commencement of the prohibition – the regime requires such a rulemaking to occur every three years. So far there have been six rulemakings, with the most recent occurring in 2015.<sup>41</sup> An exemption granted in one rulemaking applies only until the next rulemaking, at which time it must be either remade or lapse.<sup>42</sup> Thus, an exemption that was first granted in 2000 for 'literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence', was continued in 2003 but confined to computer programs with access controls that were 'obsolete' – a term then formally defined to mean 'no longer manufactured or reasonably available in the commercial marketplace.'<sup>43</sup> In 2006 and 2010 that exemption was continued.<sup>44</sup> At the following rulemaking, which occurred in 2012, the exemption was discontinued, thereby lapsing, and has not been revived since.

The process by which this exemption-by-rulemaking power is exercised is that which commonly applies to other US federal agencies.<sup>45</sup> In the latest rulemaking, the sixth triennial proceedings, the procedural history unfolded as follows. In September 2014 the Copyright Office published a Notice of Inquiry inviting interested parties to submit petitions for proposed exemptions. Forty-four such petitions were lodged.<sup>46</sup> In a December 2014 Notice of Proposed Rulemaking (NPRM) the Copyright Office concluded that three of the petitions sought exemptions that could not be granted as a matter of law, and declined to put those proposals forward for public comment and grouped the remaining proposed exemptions into twenty-seven proposed classes of works.<sup>47</sup> Nearly 40,000 comments were submitted in response to the NPRM in support or opposition, with the 'vast majority' described as short statements of support or opposition, with the minority comprising longer submissions.<sup>48</sup> In May 2015 the Copyright Office held seven days of public hearings in Los Angeles and Washington DC, taking evidence from sixty-three witnesses.<sup>49</sup> The final rule made in October 2015 entailed exemptions for ten classes of works.<sup>50</sup>

---

<sup>40</sup> *Copyright Act 1976* (US), §1201(a)(1)(B). The rulemaking inquiry is directed in §1201(a)(1)(C) to: '(i) The availability for use of copyrighted works; (ii) The availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) The impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) The effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) Such other factors as the Librarian considers appropriate.'

<sup>41</sup> The final rule makings for exemptions to the prohibition on circumvention of copyright protection systems for access control technologies are found at: 65 *Federal Register* 64,559 (27 October 2000); 68 *Federal Register* 62,011 (31 October 2003); 71 *Federal Register* 68,472 (27 November 2006); 75 *Federal Register* 43,825 (27 July 2010); 77 *Federal Register* 65,260 (26 October 2012); 80 *Federal Register* 65,944 (28 October 2015).

<sup>42</sup> *Copyright Act 1976* (US), §1201(a)(1)(D)

<sup>43</sup> 65 *Federal Register* 64,559, discussed at 64,564-64,564 (27 October 2000) and 68 *Federal Register* 62,011 discussed at 62,013-62,014 (31 October 2003).

<sup>44</sup> 71 *Federal Register* 68,472 discussed at 68,475 (27 November 2006) and 75 *Federal Register* 43,825 discussed at 43,833-43,834 (27 July 2010).

<sup>45</sup> *Administrative Procedure Act 1946* (US). For an overview of the US regime: American Bar Association, 'A Blackletter Statement of Federal Administrative Law' (2002) 54 *Administrative Law Review* 1.

<sup>46</sup> 80 *Federal Register* 65,944, 65,946 (28 October 2015)

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid* 65,961-65,964.



Several points can be made about this regime. The first is to emphasise what the power is not. It is not a regulatory power to create exceptions – such as new fair use purposes – to the primary economic rights of copyright. Rather, the power is more limited. It is to determine, as a matter of currently available evidence, the extent to which the circumvention prohibition adversely impacts upon existing ‘noninfringing’ uses, and to create, or continue, exemptions to circumvention liability to facilitate those uses. The second is that while the power was driven by Congressional Committee concerns that access control circumvention prohibition would undermine Congress’s ‘long-standing commitment to the concept of fair use’,<sup>51</sup> the ‘noninfringing’ uses themselves do not necessarily need to involve fair use. Rather they might comprise a use that has been voluntarily licensed by the rights holder or use under some other type of copyright exception in US copyright law. The third is that the Congress elected to shy away from creating such exemptions by a type of broad statutory standard that applies in fair use cases, and instead elected more clearly delineated *ex ante* rules.<sup>52</sup> Finally, a stated objective choosing a regulatory (rather than statutory) approach was to provide greater flexibility.<sup>53</sup>

The use of regulations to create circumvention exemptions has been adopted in Australia because the broad contours of the DMCA anti-circumvention regime were exported to Australia in the FTA.<sup>54</sup> This included the requirement that any *ad hoc* exceptions to the act of circumventing an access control for one’s own use of copyright (as opposed to the supply of devices or services) be made and reviewed periodically.<sup>55</sup> The Australian implementation involves the making of delegated legislation through departmental processes. Although this typically involves public comments on exposure drafts, it occurs in a way quite different from the more openly contested and evidence-based processes before the US Copyright Office.<sup>56</sup> More generally the consignment of substantive matters to regulations is not unusual in the Australian copyright system. Aside from prescribing matters of detail, important aspects of Australian copyright law are found in regulations – the regulations extending the protections of

---

<sup>51</sup> US Congress, House Committee on Commerce, *Digital Millennium Copyright Act of 1998*, House Report Number 105–551 part 2, 22 July 1998, 26.

<sup>52</sup> The regime was intended to create a mechanism which would ‘monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials’: *ibid* 36.

<sup>53</sup> *Ibid*.

<sup>54</sup> AUSFTA, arts 17.4.7 and 17.4.8.

<sup>55</sup> AUSFTA, arts 17.4.7(a), (e) and (f). The AUSFTA negotiations occurred amid litigation which revealed Australia’s initial anti-circumvention regime to not protect access controls: David J Brennan, ‘What can it mean “to prevent or inhibit the infringement of copyright”? - A critique on *Stevens v Sony*’ (2006) 17 *Australian Intellectual Property Journal* 81.

<sup>56</sup> The specific AUSFTA obligation, which sets out one category of exceptions for ‘own act circumvention’ requires confinement to circumvention to undertake: ‘non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding’: AUSFTA art 17.4.7(e)(viii). Regulations first made in 2007 and reviewed in 2012 that provides for ten categories of prescribed acts: Copyright Act 1968 (Cth), ss 116AN(9)(c) and 132APC(9)(c); Copyright Regulations 1969, reg 20Z and Schedule 10A. A departmental process is currently underway as part of a wider revision of Australian copyright regulations: <https://www.communications.gov.au/have-your-say/review-copyright-regulations-1969-and-copyright-tribunal-procedure-regulations-1969> (last visited 9 January 2018). In that review, the compliance of the Australian processes with the AUSFTA 17.4.7(e)(viii) obligation has been questioned: Submission of Australian Home Entertainment Distributors Association, 6 October 2017, 2-3.

Australian copyright law to foreign subject matter and foreign performances are perhaps the most striking example of this.<sup>57</sup> However, Australia has no experience of any agency or tribunal making copyright regulations through a process akin to that applied by the US Copyright Office under the DMCA regime.<sup>58</sup>

Since the US Copyright Office has commenced its role in making these exemptions, there has been some US academic consideration of how regulation by a US government agency 'can shift fair use from standards to rules and from litigation to administration'.<sup>59</sup> Writing in 2009, Mazzone argued that an 'administrative agency can, and should, regulate fair use'.<sup>60</sup> He suggested the creation of The Office for Fair Use (TOFU) and part of the remit of this hypothetical agency was explained as follows:

TOFU would generate regulations prohibiting interference with fair uses of copyrighted works. These regulations would specify, consistent with the [fair use provision in US copyright statute] the uses that constitute fair uses of copyrighted works in specific sectors. In developing regulations that define fair use and prohibit interference with it, TOFU would be expected to receive input from copyright owners, those who seek to make use of copyrighted works, representatives from relevant industries and interest groups, copyright law experts, and other interested parties.<sup>61</sup>

This was put as part of Mazzone's thesis that regulatory law should fill out the detail of US fair use law because fair use, in the hands of the US Congress and courts, does not function well and that 'neither entity is likely to provide a law of fair use that meets the current – and future – needs of those who make use of copyrighted works while protecting also the interests of copyright owners'.<sup>62</sup> The question raised here is: should the Copyright Tribunal of Australia assume the novel role of making regulations in a manner similar to Mazzone's imagined TOFU?

### **Current Operation of the Tribunal**

Modelled on the UK Performing Right Tribunal, the Copyright Tribunal of Australia was created within Part VI of the current Act upon its commencement in 1969.<sup>63</sup> On creation, its primary jurisdictional roles were oversight of voluntary collective licensing schemes and arbitral determination of royalty rates under statutory licences. The Tribunal is comprised of both presidential and non-presidential members, appointed by executive government for a term of no more than 7 years. Presidential membership consists of the President and one or more Deputy Presidents. Under the current qualification

---

<sup>57</sup> Copyright Act 1968 (Cth), ss 184 and 248U; Copyright (International Protection) Regulations 1969.

<sup>58</sup> An Australian body that makes regulations in a somewhat analogous manner to its American counterpart, the Federal Communications Commission (FCC), is the Australian Communications and Media Authority (ACMA). In *Harbour Radio v ACMA* (2012) 202 FCR 525, broadcasting standards made conditional upon the ACMA seeking public comment and being satisfied as to certain matters on the standard of 'convincing evidence' were found to be of a legislative nature.

<sup>59</sup> Mazzone above note 32, 415. Mazzone sets out two possible reform models: *ibid* 415-430. Others had earlier suggested private rulings and arbitral powers in administrative agencies: Michael W Carroll, *Fixing Fair Use* (2007) 85 *North Carolina Law Review* 1087 and David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations* (2006) 24 *Cardo Arts and Entertainment Law Journal* 11.

<sup>60</sup> Mazzone above note 32, 399.

<sup>61</sup> Mazzone above note 32, 415-416 (footnotes omitted).

<sup>62</sup> Mazzone above note 32, 437.

<sup>63</sup> CLRC, *Jurisdiction and Procedures of the Copyright Tribunal* (December 2000), 15.

requirements while the President must be 'a Judge of the Federal Court of Australia', to be appointed as a Deputy President a person must be 'or has been' a judge of a federal court or of a State or Territory Supreme Court.<sup>64</sup> Non-presidential members may be drawn from a wider pool, tapping into expertise from those in public administration, industry, education, economics, law – as well current and former judges.

The jurisdiction of the Tribunal has expanded since 1969. There has been some expansion of jurisdiction over the original statutory licences, in particular by conferring upon the tribunal an arbitral rate determination power over the mechanical reproduction licence for musical works.<sup>65</sup> The jurisdiction of the Tribunal over voluntary collective licences has also somewhat expanded.<sup>66</sup> However most expansion has been driven by the creation in the 1980s of statutory licences administered under a declared collecting society model whereby member-based, not-for-profit companies are declared under public law (usually by a government Minister, but also by the Tribunal itself) to administer statutory licences and remit collected royalties to their members. Aside from arbitral rate determination power under the new statutory licences, jurisdiction has been conferred on the Tribunal to: revoke a collecting society's declaration; to make declarations of societies for the collective administration of the government copying licence; and, to review declared societies' distribution arrangements.<sup>67</sup> In all cases questions of law can be referred by the Tribunal to the Federal Court of Australia, and judicial review of determinations of the Tribunal is always available to an aggrieved party.<sup>68</sup>

In broad terms the current jurisdiction of the Tribunal can be thought of as comprising two aspects: (i) an administrative arbitral power over royalty rates and collective voluntary licences, and (ii) an administrative oversight power over declared societies and their operations. However, the proposal outlined below involves the grant of legislative power to the Tribunal. Because the Tribunal President must be 'a Judge of the Federal Court of Australia' and other members may be serving federal judges, the Constitutional issue of separation of powers squarely confronts the proposal. It is that issue which is discussed next.

### **The separation of powers issue**

---

<sup>64</sup> Copyright Act 1968 (Cth), ss 140-2.

<sup>65</sup> Copyright Act 1968 (Cth), ss 149-153 (dealing with the statutory licences not administered by declared societies).

<sup>66</sup> Copyright Act 1968 (Cth), ss 136, 137, 154-159 (voluntary collective licensing provisions). After the determination in *Reference by Powercom Interactive Media Pty Ltd* [2003] ACopyT 1 exposed the inconvenience of the limitation of the voluntary collective licensing jurisdiction to communication and public performance rights, the definition of 'licence' (in s 136) was amended in 2006 to extend to the licensing of 'an act comprised in the copyright'. Also in 2006 the Tribunal was given power to direct alternative dispute resolution: Copyright Act 1968 (Cth), ss 169A-169G.

<sup>67</sup> Copyright Act 1968 (Cth), ss 153A, 153L (oversight of compulsory licensing scheme for education); ss 153E-153KA (oversight of collective administration of government copying); ss 153M-153R (oversight of compulsory licensing scheme for retransmission); ss 153RA-153W (oversight of compulsory licensing scheme for satellite re-broadcasting)

<sup>68</sup> Copyright Act 1968 (Cth), ss 161 (reference on a question of law); *Fitness Australia v Copyright Tribunal* [2010] FCAFC 148 is an example of the Federal Court setting aside a Tribunal determination under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

The Australian Constitution separates executive (i.e. administrative) power in Chapter One, from legislative power in Chapter Two, and both from judicial power in Chapter Three.<sup>69</sup> The Copyright Tribunal of Australia is not a court established under Chapter Three, but rather an administrative decision-making body, and as such it does not exercise the judicial power of the Commonwealth. The Privy Council, in the *Boilermakers Case*, upheld the High Court's invalidation of provisions that had created the Commonwealth Court of Conciliation and Arbitration under Chapter Three which had vested in that court a mix of non-judicial (making industrial awards) and judicial (enforcing those awards) powers.<sup>70</sup> The Privy Council stated:

In a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.<sup>71</sup>

Those appointed to the Copyright Tribunal of Australia because of their status as current judges are not acting in any judicial capacity when sitting on the Tribunal, which is an administrative decision-making body. Rather, appointments of federal judges by the Commonwealth Parliament or Executive to such non-judicial roles falls within the long-standing *persona designata* ('designated person') exception to the Federal separation of powers doctrine.

The *persona designata* exception permits such appointments of federal judges to non-judicial roles so long as: (i) the appointment is in a personal capacity only, (ii) there is free volition on the part of appointee to accept or reject the position, and (iii) the appointed role is compatible with the discharge of judicial power.<sup>72</sup> The third issue, compatibility, has received attention by the High Court in three cases in the 1980s and 1990s. The first two of those cases involved the legislative vesting of executive power in those holding office as a Federal Court judge to grant, at the request of policing agencies, telecommunications interception warrants as *personae designatae*.<sup>73</sup> The final case involved the executive appointment of a Federal Court judge as *persona designata* to prepare an Aboriginal heritage report, addressed to the relevant government minister, on an area of South Australia.<sup>74</sup> In the first two cases the High Court concluded that the vesting of the warrant-issuing power was compatible with the discharge of judicial power; a decision whether to issue a warrant, while an administrative exercise of

---

<sup>69</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275: 'If you knew nothing of the history of the separation of powers ... you would still feel the strength of the logical inferences from Chaps. I, II and III and the form and contents of ss. 1, 61 and 71. It would be difficult to treat it as a mere draftsman's arrangement. Section 1 positively vests the legislative power of the Commonwealth in the Parliament of the Commonwealth. Then s. 61, in exactly the same form, vests the executive power of the Commonwealth in the Crown. They are the counterparts of s. 71 which in the same way vests the judicial power of the Commonwealth in this Court, the federal courts the Parliament may create and the State courts it may invest with federal jurisdiction. This cannot all be treated as meaningless and of no legal consequence.'

<sup>70</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (High Court); *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 (Privy Council).

<sup>71</sup> *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 540-541.

<sup>72</sup> See generally: Rebecca Ananian-Welsh and George Williams, 'Judicial from the Executive: A First-Principles Review of the Cases' (2014) 40 *Monash University Law Review* 593, 626-630.

<sup>73</sup> *Hilton v Wells* (1985) 157 CLR 57 and *Grollo v Palmer* (1995) 184 CLR 348.

<sup>74</sup> *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1

executive power, was a sufficiently independent function.<sup>75</sup> In the third case, however, the High Court concluded that the appointment to write a report for the minister was incompatible with judicial office because it: ‘places the judge firmly in the echelons of administration, liable to removal by the Minister before the report is made and shorn of the usual judicial protections, in a position to that of a ministerial adviser’.<sup>76</sup> In arriving at that conclusion, the court emphasised that incompatible functions will be those which are ‘an integral part of, or closely connected with, the functions of the legislative or executive Government’.<sup>77</sup>

It seems relatively uncontroversial to conclude that no current Tribunal function triggers any issue of incompatibility that would take the appointment of current federal judges to the Tribunal outside of the *persona designata* exception. While the Tribunal performs a range of administrative functions – including the declaration of collecting societies to perform statutory duties – it is not at all obvious that those functions so lack independence from, or are so integrated with, legislative or executive power as to transgress the boundaries set in the High Court authorities. However, the conferral of a power upon the Tribunal to make regulations – to legislate – is a far cry from its current arbitral and oversight administrative roles.<sup>78</sup> The making of such exceptions appears integral to the functions of legislative Government and therefore well outside of the *persona designata* exception under current separation of powers authorities. Accordingly, it is difficult to imagine that sitting Federal Court judges could be members of a Tribunal empowered to perform a legislative function without that membership offending basic separation of powers principles.<sup>79</sup>

This leads to the threshold hurdle confronting the reform idea being put in this article: how can a Tribunal legislate when doing so is likely to be unconstitutional? It seems important to the continued good standing of the Tribunal and the high quality of its decision-making that members with judicial experience remain as Presidential members. The resolution offered here is a straightforward one:

---

<sup>75</sup> *Grollo v Palmer* (1995) 184 CLR 348, 367: ‘because of the intrusive and clandestine nature of interception warrants and the necessity to use them in today’s continuing battle against serious crime that some impartial authority, accustomed to the dispassionate assessment of evidence and sensitive to the common law’s protection of privacy and property, be authorised to control the official interception of communications’.

<sup>76</sup> *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 18-19.

<sup>77</sup> *Ibid* 17.

<sup>78</sup> Administrative Review Council, *Rule Making By Commonwealth Agencies* (Report No 35, 1992), 17: ‘Three characteristics might be used to distinguish legislative action from executive action – determination of the content of the law; the binding quality of the rules; and the generality of their application. The first is likely to be conclusive. The presence of the second and third in combination is also a very strong indicator that an instrument is legislative in nature.’ The proposal put forward in this article comprises legislative action.

<sup>79</sup> Courts established under Chapter Three of the Australian Constitution have power to make rules of court – e.g. Federal Court of Australia Act 1976 (Cth), s 59. Roscoe Pound, ‘Regulation of Judicial Procedure by Rules of the Court’ (1915-1916) 10 *Illinois Law Review* 163, 170-171 argued that the separation of powers doctrine “does not prescribe an exact analytical scheme” and set out how English courts had made procedural rules of court since the 15<sup>th</sup> Century. In *R v Davison* (1954) 90 CLR 353 Dixon CJ and McTiernan J at 369 refer to Pound’s research when observing: ‘An extreme example of a function that may be given to courts as an incident of judicial power or dealt with directly as an exercise of legislative power is that of making procedural rules of court ... Nevertheless it is clear enough that making rules of procedure may in one point of view be regarded as a legislative function, though in another point of view it may be considered as an incident of judicial power.’ The legislative power in the judges of a court to make rules to govern the court’s own processes appears to fall within a longstanding historical (as opposed to analytical) qualification on the separation of powers doctrine, and any legislative power to make copyright exceptions is seemingly well outside of that qualification.

reconstitute the membership of the Tribunal so that its Presidential membership only consists of retired federal judges.

If the core reform proposal being prosecuted here is considered sufficiently worthwhile, there are several reasons why this change to the presidential membership of the Tribunal is relatively straightforward. First, retired judges are currently qualified to serve as Presidential members of the Tribunal. Second, since Constitutional Amendment in 1977, federal judges must retire upon reaching the age of 70 and it is not uncommon for judges to consider this premature.<sup>80</sup> Because of that, and with ever-increasing life expectancies, an excellent pool of human capital has been created that is willing and able for future public service – such as membership of the Tribunal.<sup>81</sup> Third, and related to the second point, it is not uncommon for retired federal judges to perform a range of functions integral to legislative or executive Government that are squarely incompatible with the contemporaneous holding of judicial office under current law. Manifestly there is no federal separation of powers impediment upon *retired* federal judges performing such functions. Indeed, three High Court judges (Sir Isaac Isaacs, Sir William Deane and Sir Ninian Stephen) have been appointed after retirement to the position which sits closest to the pinnacle of executive power: Australian Governor-General.

### **Possible means of implementation**

Section 200AB stands out as the current provision that could be overhauled to create the statutory footing for exceptions by regulation. As noted above the section was introduced in the wake of the AUSFTA as essentially a political solution to address the concerns of certain peak user groups, while also placating copyright owners by adopting the expedient of the three-step test as a restriction upon its operation. It was intended to create a flexible fall-back free exception regime for the benefit of libraries, archives, educational institutions and people with a disability. However, the inscription into the provision of the three-step test renders the operation of section 200AB quite obscure. Hudson concludes from her empirical work that the provision has had a poor reception from those sectors intended to benefit most from it. A key reason for this was its ‘language that was bereft of meaning’.<sup>82</sup> This is unsurprising. The three-step test exists in international law to provide guiding criteria to national legislators when crafting exceptions to intellectual property rights.<sup>83</sup> The three-step test is neither addressed to, nor intended to be applied by, individual users.

It is worthwhile to broadly map out for the public policy consideration (i.e. without overly prescriptive detail) a different type of approach to fair use: revising section 200AB so that it becomes an exception defined by Tribunal regulation. A reformed section 200AB could simply provide that copyright is not

---

<sup>80</sup> Peter Heerey, *Can You See the Mountain? A Legal Journey with a Few Diversions* (Hybrid Publishers, 2017), 131: ‘I retired on 15 February 2009, the day before I reached the compulsory retiring age of 70. In fact, I had long been entitled to retire on a full pension ... but I liked the job and would happily have continued’. In his retirement former Federal Court Justice Peter Heerey was engaged by the executive in two important public roles: Chair of the Australian Electoral Commission and as an adviser to the Federal Minister for Employment on whether there existed grounds for the Parliamentary removal of a then Vice-President of the Fair Work Commission: *ibid* 133-138.

<sup>81</sup> Federal Court Justices Burchett and Lindgren, who during their tenures served as the President of the Copyright Tribunal of Australia, in retirement have served as the Code Reviewer for the Code of Conduct for Copyright Collecting Societies which commenced in 2002. The repository of Code of Conduct publications is available at: <https://www.screenrights.org/about-us/governance/code-of-conduct> (last visited 9 January 2008).

<sup>82</sup> Hudson above note 20, 228.

<sup>83</sup> Ricketson and Ginsburg above n 2.

infringed by a use within the scope of a regulation made by the reconstituted Tribunal under a new Division to be inserted into Part VI of the current Act. That new Division, when authorising the Tribunal to make exceptions by regulation, could require its satisfaction perhaps by the standard of ‘convincing evidence’<sup>84</sup> of two basic criteria: first that the exception will serve the national public interest and second that it satisfies the three-step test.

Serving the national public interest is a quite generalised criterion and indeed it might explain all copyright exceptions in local public laws. The joint Australian and New Zealand position at the 1928 Rome conference to revise the Berne Convention was to advocate for a broad ‘public interest’ reservation to the then new broadcasting exclusive right.<sup>85</sup> This was to protect ‘the cultural and social interests’ linked to broadcasting.<sup>86</sup> Similar to the three-step test, it is a broad standard that should inform public law making rather than apply in private law as a defence.<sup>87</sup> It requires in any case an overarching consideration (well-suited to legislative processes) of the social benefits of weaker exclusive rights in copyright, as against the social harms of weakening the foundations that support copyright-dependant industries.<sup>88</sup>

The regime could incorporate a periodic process whereby the Tribunal is obliged to conduct public inquiries, like those undertaken by the US Copyright Office when recommending exemptions to DMCA liability.<sup>89</sup> However past regulations made by the Tribunal, rather than expiring unless revived (as occurs under the DMCA regime), might continue as presumptively meeting the two criteria. The onus would be placed on those seeking repeal or modification to establish an exception no longer satisfies one or both criteria. For any new regulatory exception, the onus would be placed on those seeking it to set out evidence that satisfies both criteria. There could also be a mechanism for a party to trigger with leave of the Tribunal in extenuating circumstances an *ad hoc* Tribunal inquiry into a possible new exception outside of any periodic inquiry process. At all times inquiries would be conducted openly.

Advantages of such an approach are both its flexibility and certainty: the capacity of the Tribunal to *ex ante* tailor rules-based exceptions. In this, each exception would be assessed against the three-step test under a process and in a forum capable of making that assessment. Issues such as an exception’s

---

<sup>84</sup> The statutory standard considered in *Harbour Radio v ACMA* (2012) 202 FCR 525 and which conditioned the regulation-making power there conferred upon ACMA.

<sup>85</sup> William Harrison Moore, International Copyright Conference Rome, May and June 1928 *Report of the Australian Delegate*, 4 July 1928, 8. Contrast the more restrictive reservation necessity for the interests of *l’ordre public* (the protection of the fundamentals of society) that was suggested in response by Continental countries: David J Brennan, *Retransmission and US Compliance with TRIPS* (Kluwer, 2003), 21-23.

<sup>86</sup> International Union for the Protection of Literary and Artistic Works, Records of the Conference Convened in Rome, May 7 to June 2, 1928, General Report of the Drafting Committee, translated and reproduced in *Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986* (WIPO, 1986), 174.

<sup>87</sup> In *Smith Kline & French Laboratories v Department of Community Services & Health* (1990) 22 FCR 73, Gummow J at 111 accepted the proposition that an asserted public interest defence to a breach of confidence action was “not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an *ad hoc* basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence”.

<sup>88</sup> CLRC above n 3, [6.16].

<sup>89</sup> Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (4th ed, 2012), 195 discuss authorities on adherence to consultation as a formal matter in the judicial review of rule-making. The consultation requirement contemplated for such copyright regulations should exceed the weaker general consultation obligations found in the Legislative Instruments Act 2003 (Cth), ss 17 and 19.

relationships with other exceptions (e.g. existing remunerated exceptions) and contractual liability (e.g. the ability to contract out of exceptions) could be considered in each case within the assessment rubric of the two criteria.<sup>90</sup> Thus any exceptions so made could have bespoke qualities, and indeed the Tribunal could consider the creation of free exceptions that apply only in the absence of voluntary licensing schemes – ‘license it or lose it’.<sup>91</sup> The process would also permit other public agencies – such as the Australian Competition and Consumer Commission (ACCC) – to participate and provide evidence.<sup>92</sup> Moreover consigning this power to the Tribunal tends to depoliticise a policy contest that usually creates more heat than light. It would move the highly charged debates around new copyright exceptions to a forum accustomed and equipped to resolving issues in an evidence-based manner.

As delegated legislation, any Tribunal-made exceptions would be reviewable in two distinct fora: legal and political. Substantive grounds for judicial review are essentially confined to *ultra vires* issues.<sup>93</sup> Politically a Commonwealth regulation may, in general, be disallowed upon a motion being passed by either the House of Representatives or the Senate.<sup>94</sup> There are, however, over 40 types of legislative instruments that are not subject to such disallowance.<sup>95</sup> If this proposal were to be further explored, a likely topic for argument would be whether any Tribunal-made regulatory exceptions should be added to the list of those that are not disallowable.

## Conclusion

For the relatively small jurisdiction of Australia, the Tribunal-based proposal outlined here appropriates benefits drawn from fair use’s flexibility and black letter law’s certainty. The proposal seeks to achieve this by also converting section 200AB’s use of a treaty norm as nakedly applicable domestic law into a more fitting role: guiding a legislative process. However, the reform proposed cannot operate effectively without some public and private sharing of a cost burden. Inquiries being conducted periodically by the Tribunal would be a public administration task that is new to the Australian copyright system. Submission-making to such inquiries is taxing on those engaged in the process – particularly those actively compiling an evidence base to either convince or cast doubt on whether a proposed exception meets the necessary criteria. However, the quality of many of the submissions made to the numerous reviews into Australian copyright law over recent decades suggests that Australian peak bodies on all sides, and public bodies such as the ACCC, are well-equipped to fully participate in any such a rule-making process.

---

<sup>90</sup> Compare the blunt nature of the ALRC’s recommendations on its proposed fair use exception on those relationships: ALRC above note 5, 15-16 Recommendations 8-1 and 20.

<sup>91</sup> Jane C Ginsburg, ‘Fair Use for Free, or Permitted-but-Paid?’ (2014) 29 *Berkeley Technology Law Journal* 1383, 1415-1416 discussing the ‘license it or lose it’ exceptions found in the United Kingdom and New Zealand: Copyright, Designs and Patents Act 1988 (UK), ss 31, 35 and 74 and Copyright Act 1994 (NZ), ss 44, 48, 57, 88 and 91 which condition free exceptions for specific purposes on the non-existence of voluntary licensing schemes. An Australian free exception could be created by the Tribunal for a designated purpose and which made its operation conditional upon the absence of any applicable ‘licence scheme’ amenable to the Tribunal’s jurisdiction under the existing regime: Copyright Act 1968 (Cth), ss 136, 137, 154-159

<sup>92</sup> The role of the ACCC in Australian commercial life is already reflected in the provisions relating to the Tribunal’s licence scheme jurisdiction: Copyright Act 1968 (Cth), ss 157A and 157B.

<sup>93</sup> Pearce and Argument above note 89, ch 12.

<sup>94</sup> Legislative Instruments Act 2003 (Cth), s 42.

<sup>95</sup> Legislative Instruments Act 2003 (Cth), s 44,



The proposal put forward here may not attract support from the extreme ends of copyright politics – either those on the user side wanting to hold out for an open-ended Australian fair use exception or those on the rightsholder side wanting to hold at bay indefinitely the idea of any new exceptions regime. It is a middle-of-the-road suggestion, tapping into the strength of Australian institutions, and seeking to explore in the context of the government’s response to the ALRC Report a different type of approach. The suggestion also has deep roots insofar as the earliest statutory copyright exception in the Anglo tradition was jurisdiction vested in the Judicial Committee of the Privy Council from 1842 to grant *ad hoc* compulsory licences. This was to remedy the apprehended suppression of individual works in their post-mortem term.<sup>96</sup> That such a forum-based approach was the first example of a statutory exception to copyright might give some comfort to policy makers considering this proposal. However, this early precedent also represents a public policy warning. For over 100 years, until its abolition in 1956 not a single application was made to the Privy Council for the jurisdiction to be exercised. This history suggests that before any reform – and especially given that the Tribunal will most probably need to be reconstituted to facilitate that reform – key stakeholders and the government should be persuaded that such a Tribunal regulation-making power is needed, and its consultative processes will promote active participation from relevant interests.

---

<sup>96</sup> David J Brennan, ‘The first compulsory licensing of patents and copyright’ (2017) 17 *Legal History* 1, 12-14.