

document calculated to convey the impression that Mr Baltinos' allegations had been upheld in an independent and competent inquiry.<sup>24</sup>

## Conclusion

Injurious falsehood is a cause of action relied upon much less frequently than defamation or actions for misrepresentation under the *Trade Practices Act 1974* (Cth). The relative rarity of injurious falsehood actions is directly related to the difficulty that a potential plaintiff faces in proving malice, and *Australand v TACI* is a good example of the difficulty of establishing this malice. Even when faced with outrageous statements that had been determined on several occasions by competent courts and tribunals to be false, McCallum J required more to establish an improper purpose amounting to the required malice. On the facts, the impropriety required to establish malice was probably the promise to withhold publication if compensation was paid. Assuming similar offers are not regularly made by editors, it would appear unlikely that media organisations would be held to account in injurious falsehood for their activities.

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(Endnotes)

- 1 LSJ October 2008 page 69
- 2 *Palmer Bruyn & Paker v Parson* [2001] 208 CLR 388 per Kirby J at 419.
- 3 [2008] NSWSC 669
- 4 *Ratcliffe v Evans* 2 QB 524.
- 5 *Ratcliffe v Evans* 2 QB 524 at 527.
- 6 *Swimsure (Laboratories) Pty Limited v McDonald* [1972] 2 NSWLR 796.
- 7 *Swimsure (Laboratories) Pty Limited v McDonald* [1972] 2 NSWLR 796 at 799D.
- 8 *Palmer Bruyn & Parker v Parsons* [2001] 208 CLR 388 per Kirby at 425.
- 9 *Palmer Bruyn & Parker v Parsons* [2001] 208 CLR 388 per Gummow J at [52].
- 10 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [96].
- 11 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [7].
- 12 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [67].
- 13 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC

669 at [144].

14 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2003] NSWSC 1163.

15 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [165].

16 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [78].

17 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [167].

18 *Webb v Bloch* (1928) 41 CLR 331.

19 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [99].

20 *Palmer Bruyn & Paker v Parson* [2001] 208 CLR 388 per Gummow J at 397.

21 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [150-151].

22 *Horrocks v Lowe* [1975] AC 135 at 150 per Diplock, LJ.

23 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [156].

24 *Australand Holdings Limited v Transparency & Accountability Council Inc & Anor* [2008] NSWSC 669 at [164].

# Classroom Use of Multimedia Materials – Copyright Infringement or a ‘Special Case’?

Alex Farrar examines the impact of amendments to the Copyright Act 1968 (Cth) on the use of multimedia content in classrooms and questions whether these amendments have achieved their intention of providing greater flexibility in the use of copyright materials.

The use of multimedia content in the classroom has strong pedagogical justifications.<sup>1</sup> It offers an alternative to traditional classroom teaching methods, which are not geared towards visual learners,<sup>2</sup> whilst students regard the medium as being more current and relevant to their interests and experience.<sup>3</sup> New classroom technology – such as interactive whiteboards<sup>4</sup> – promote classroom use of multimedia content, and, when coupled with high-quality online multimedia libraries, such as the National Film and Sound Archive,<sup>5</sup> create opportunities for its effective integration into curricula. However, the use of multimedia content in a classroom necessitates dealing with the copyright in the material in ways traditionally reserved exclusively for the copyright holder.

In 2006, the *Copyright Amendment Act* (Cth) (CAA) made changes to Australia's copyright law designed to permit limited, unlicensed 'flexible' dealings in copyright digital and multimedia materials for certain educational purposes. However, because the drafters of the amendments were focused on technology-neutrality and flexibility, the amendments have failed to establish bright-line rules.<sup>6</sup> This essay contrasts the Government's intention in enacting the 'flexible dealing' provision, with its effect. The very

flexibility introduced in order to permit innovative, socially-beneficial use of copyright materials creates such uncertainty as to be a disincentive to use.

## Use of Multimedia in the Classroom

Recent trials and pilots by State and Territory Departments of Education provide two examples of the ways in which schools and teachers are encouraged to use multimedia works in the classroom. The first example is the display of multimedia DVD ROMs (for example) on a communal interactive whiteboard to promote group learning.<sup>7</sup> The second is the development by teachers of their own multimedia resources for use in a specific lesson,<sup>8</sup> or in support of particular learning objectives.

In relation to this first type of use, delivery mechanisms like *Clickview* provide schools with centralised hardware for storage of digital or multimedia content.<sup>9</sup> Typical use of a multimedia DVD ROM in a school would

*the use of multimedia content in a classroom necessitates dealing with the copyright in the material in ways traditionally reserved exclusively for the copyright holder*

## section 28 allows schools to perform and communicate copyright material in class without having to pay a statutory licence fee

entail the storing of its contents on a central server (say, in a school's library) and reticulating the file to the classroom for use on its interactive whiteboard. Such use requires 'dealings' with the work including:

- making a digital copy of the work for uploading to the central server;
- the transmission from the library to the classroom requires multiple reproductions while in transit;
- the reception of the work on the recipient's whiteboard (or computer) involves public display and/or performance, and RAM copying.

A permanent copy of the work might also be made on the whiteboard's hard disk.

The second type of use involves the teacher compiling or transforming existing copyright materials into a single resource, often accompanied by lesson plans and worksheets. This second use is the more problematic within the context of 'fair dealing'.

### Educational Exceptions Prior to the Copyright Amendment Act 2006

Because fair dealing's permitted purposes include those of research or study, even prior to the enactment of the CAA, teachers could make unauthorised use of copyright materials in certain, narrow circumstances, and only if such use was also 'fair'.<sup>10</sup> Additionally,

## the flexible dealing provision aims to provide a flexible exception to enable copyright material to be used for certain socially useful purposes

some uses were – and remain – permitted under the statutory licence scheme.

The 'fair dealing' exceptions to copyright infringement are specific, purpose-built and geared towards providing certainty for a user. But purpose-built provisions are necessarily narrow and inflexible. Developments in technology, coupled with the tightening of Australia's copyright laws under the free trade agreement with the United States (US), required a new approach.

### Recent Amendments to the Australian System

The CAA amended the *Copyright Act 1968* (Cth) (CA) by introducing new exceptions to copyright infringement, including section 200AB which permits 'flexible dealing' in certain works,<sup>11</sup> and section 28 which permits limited performance and communication of works or other subject-matter in the course of educational instruction.

While these amendments change the way multimedia works can be stored, used, and viewed by schools and educational institutions, section 200AB has created a number

of problems. During the drafting of the amendments, a number of objections to the 'flexible dealing' provision were raised, including that it would lead to an increase in uncertainty,<sup>12</sup> its interpretation would be unclear and would lead to more litigation<sup>13</sup>, and that it would give too much power to courts at the expense of Parliament<sup>14</sup>. A number of these concerns are borne out in a detailed evaluation of the provision.

### Section 28: Performance and Communication in the course of educational instruction

Section 28 of the CA states:

*Where a literary, dramatic or musical work:*

- (a) is performed in class, or otherwise in the presence of an audience; and*
- (b) is so performed by a teacher in the course of giving educational instruction, not being instruction given for profit, or by a student in the course of receiving such instruction,*
- (c) the performance shall ... be deemed not to be a performance in public if the audience is limited to persons who are taking part in the instruction or are otherwise directly connected with the place where the instruction is given.*

In short, section 28 allows schools to perform and communicate copyright material in class without having to pay a statutory licence fee. This permits schools to upload copyright materials to their computer networks or intranet, or to an interactive whiteboard or other content management system for the purpose of teaching a particular class, because a 'performance' under section 27 of the CA includes any mode of visual or aural presentation, including of films and television broadcast. While schools have always been able to show a film, stage a play, or play a CD, this provision has now been extended to allow

schools to utilise new technology to communicate copyright materials, even when doing so requires duplication of the materials.

The section also permits short-term storage of some third-party copyright material, but only for as long as necessary for a particular class. That is, schools can't make a library of stored materials for use as and when they are needed. It is to be stored for a particular class or activity only and cannot be used for entertainment purposes. Section 28 does not permit schools to circumvent copy protection embedded in a physical copy of the work such as macrovision-protection.

### Section 200AB: the Flexible Dealing Provision

The stated aim of the flexible dealing provision is 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'.<sup>15</sup>

For the flexible dealing exception to apply, the following requirements, as set out in section 200AB(1), must be satisfied:

- (a) the circumstances of the use amount to a special case;*
- (b) the use is by a body administering library or archives, by a body administering educational institution or by or for person with a disability;*
- (c) the use does not conflict with a 'normal exploitation' of the copyright work; and,*
- (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.<sup>16</sup>*

Pursuant to section 200AB(3), 'use by a body administering educational institution' means a use that is:

- (a) made by or on behalf of a body administering an educational institution; and*
- (b) made for the purpose of giving educational instruction; and*
- (c) not made partly for the purpose of the body obtaining a commercial advantage or profit.*

The prohibition on obtaining a commercial advantage or profit does not prevent charg-

## Paragraphs (a), (c), and (d) of the flexible dealing requirements mirror the language of the three-step test contained in Article 13 of TRIPS

## *Few teachers are equipped to conduct subtle statutory interpretation; a risk-adverse educator will rarely, if ever, determine that their proposed use accords with Article 13*

ing a fee, on a cost-recovery basis, for providing a service to users.

Paragraphs (a), (c), and (d) of the flexible dealing requirements mirror the language of the three-step test contained in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>17</sup> and, in fact, section 200AB's 'special case', 'normal exploitation' and 'unreasonably prejudice' terms are defined as having the 'same meaning as in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights'.<sup>18</sup>

TRIPS sets out minimum standards for drafters of copyright law, and, relevantly for section 200AB, the permissible limitations or exceptions to the rights of copyright owners. Article 13 of TRIPS provides 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'.<sup>19</sup> This wholesale incorporation of terminology from TRIPS into domestic law is controversial,<sup>20</sup> because the 'three-step test' is intended to set parameters for the drafting of TRIPS-compliant exceptions by legislators.<sup>21</sup> Instead, it has been incorporated verbatim as the text of the legislation, and now must be applied by courts to determine whether a particular use is permitted within Australian law.<sup>22</sup> Few teachers are equipped to conduct subtle statutory interpretation; a risk-adverse educator will rarely, if ever, determine that their proposed use accords with Article 13. Article 13 itself contains no definition or explanation of the key 'three-step' terms. One WTO Panel decision has applied the three-step test.<sup>23</sup> However, the decision offers little practical or certain guidance for teachers or educators.

### **The Three-Step Test Considered**

#### **The First Step: Special Case**

The WTO Panel found that 'special' means "limited in its field of application or exceptional in its scope", "narrow in quantitative as well as a qualitative sense", so that it does not exempt a large number of users.<sup>24</sup> 'Case' was held to mean "could be described in terms of beneficiaries of the exceptions, equipment used, types of works or by other factors".<sup>25</sup>

## *the US Convention on Fair Use has established a practical guide for educational use of copyrighted multimedia material*

### **The Second Step: Does Not Conflict with the Normal Exploitation of the Work.**

The second step essentially requires a teacher to make a determination about the owner's possible use and exploitation of the work. According to the Panel, 'normal exploitation' includes actual and potential uses of the work.<sup>26</sup> Not every commercial use 'conflicts' with a normal exploitation of the work, only those uses that would deprive the owner of 'significant' or 'tangible' commercial profits.<sup>27</sup> 'Normal exploitation' should be something less than the full scope of the exclusive right.<sup>28</sup>

This explanation doesn't provide assistance in transformative use, such as where a teacher integrates a clip from a film into a new multimedia compilation.

## *if educational institutions consider it too risky to rely on such an uncertain exception, the flexible dealing provisions could become practically redundant*

### **The Third Step: Does Not Unreasonably Prejudice the Author's Legitimate Interests**

The WTO Panel interpreted 'legitimate' to mean "[lawful] from a legal positivist perspective, but it also has the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of objectives that underlie the protection of exclusive rights".<sup>29</sup> 'Prejudice' means any damage, harm or injury, but the key question is whether the prejudice is 'unreasonable'.<sup>30</sup>

What is the degree or level of prejudice that may be considered unreasonable?<sup>31</sup> The Panel said that this is to be determined on a case-by-case basis, weighing up respective interests and the real economic prejudice that such an exception causes to the author.<sup>32</sup>

### **What Kinds of Uses are Allowed?**

While section 28 is unproblematic, permitting the 'performance' of the multimedia program described in this essay's first example of potential use, section 200AB, even with the benefit of the WTO decision, pro-

vides no workable guidelines to teachers in respect of transformative use of multimedia. It is possible that section 200AB may permit teachers to create their own 'mashup' multimedia digital resources. At least to some degree, the section permits the copying of clips of film or music (for example) to embed in resources for classroom use, and to store those resources in a long-term manner. Further, under section 200AB, schools may be able to store copyright materials on a more permanent basis. But, in general, there are very few indicators as to how or what uses are permitted under section 200AB.

It remains to be seen how and to what extent schools will utilise the flexible dealing provision. What is certain is that the exception will not apply to what can loosely be described as 'commercial' activities, although drawing a boundary between what is and is not conducted for commercial advantage or profit is obviously difficult.<sup>33</sup> This lack of certainty in the interpretation of section 200AB raises a number of questions as to the practical availability of flexible dealing. A teacher cannot reasonably be expected to determine if his

or her proposed use conflicts with the 'normal exploitation' and 'legitimate interests' of a third-party copyright holder. Additionally, the policy-based assessment of copyright law's objectives, as required under the third-step, is a question for courts, not teachers and educational institutions.

If educational institutions consider it too risky to rely on such an uncertain exception, the flexible dealing provisions could become practically redundant.<sup>34</sup>

### **What is the Solution?**

Because section 200AB is already the product of a legislative balancing act, there are no clear solutions to its flaws. However, the US Convention on Fair Use, in wrestling with the same three-step test, has established a practical guide for educational use of copyrighted multimedia material (**Multimedia Guidelines**).<sup>35</sup> The Multimedia Guidelines are an agreement between copyright holders – including the Motion Picture Association of America, Time Warner Inc., Music Publishers' Association of the United States and others – as to what uses they will permit in relation to their materials. The private nature of the Multimedia Guidelines is limiting in scope, and may not be workable in the Australian media environment, where copyright is not concentrated in the hands of a few large studios and corporations. However, the Multimedia Guidelines illustrate how guidance can be developed to determine what is an acceptable level and use of copyright multimedia materials for educational use.

## *the Multimedia Guidelines represent the level of educational use deemed to be acceptable by leading multimedia copyright holders and provide clear guidelines to US educational users*

The Multimedia Guidelines apply to projects that incorporate an “educators’ original material, such as lesson plans or worksheets, together with copyrighted material such as audio-visual material (referred to as ‘motion media work’), music, text, graphics, illustrations, photographs and digital software which are combined into an integrated presentation.”<sup>36</sup> In short, the Multimedia Guidelines provide certainty for teachers who wish to create their own educational, multimedia resources from third-party copyright materials.

The Multimedia Guidelines do not permit an instructor to use copyrighted materials over an extended period of time without obtaining the permission of the copyright holder.<sup>37</sup> Use of the multimedia by the educator is restricted to two years after the first instructional use within a class.<sup>38</sup> Any additional use “requires permission for each copyrighted portion incorporated in the production.”<sup>39</sup> This is the balance the parties have agreed to strike between the commercial interests of copyright holders and society’s educational and cultural interests.

Importantly, the Multimedia Guidelines represent the level of educational use deemed to be acceptable by leading multimedia copyright holders, and, in so doing, provides clear guidelines to US educational users.

### **Conclusion**

In moving away from the crafting of specific exceptions, the Australian flexible dealing provision now requires a would-be user of copyright materials for educational use to make a number of objective determinations in relation to both his use, and the interests of the copyright holder, without the benefit of clear guidelines.

The stated aim of section 200AB is 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”.<sup>40</sup> While usage of copyrighted materials by schools and educators to create new, multimedia materials for classroom use, would serve a ‘socially useful’ purpose, the uncertainty created by the wording of the section creates a practical barrier to such use.

In a subject area mired with uncertainty, the US’s Multimedia Guidelines provide one example of bright-line rules that are effective and permit ‘socially valuable’ transformation of third-party copyright materials. While it may be that Australia is, at least in the medium-term, saddled with its current

scheme, introduction of similar guidelines – whether as part of a specific free exception or under a new cross-media statutory licence – could provide a solution to the uncertainty surrounding the creation of education multimedia materials using copyrighted works.

**Alex Farrar is a corporate lawyer with the Australian Children’s Television Foundation. This essay was written while Alex was a student at Melbourne University and won the 2008 CAMLA essay competition.**

(Endnotes)

1 See for example, Peter Kent & Matthew Holdway ‘Interactive Whiteboards, Productive Pedagogies and Literacy Teaching in a Primary Context’ at <http://www.englishliteracyconference.com.au/files/documents/Papers/Non-Refereed%20Papers/Kent%20and%20Holdway%20.pdf>.

2 Jayne Elizabeth Zanglein & Katherine Austin Stalcup, ‘Te(a)chnology: Web-Based Instruction in Legal Skills Courses’ (1999) 49 J. Legal Educ. 480 at 482-92.

3 Edith R. Werkentine, ‘Kingsfield Doesn’t Teach My Contracts Class: Using Contracts to Teach Contracts’ (2000) 50 J. Legal Educ. 112 at 120.

4 Interactive whiteboards are becoming commonplace in Australian schools. As an example, by 2011 every New South Wales state school will be provided with at least one interactive whiteboard: <http://www.theage.com.au/news/technology/schools-to-install-digital-whiteboards/2007/06/18/1182019011079.html>.

5 See [www.nfsa.gov.au](http://www.nfsa.gov.au).

6 Andre Hampton, ‘Legal Obstacles to Bringing the Twenty-First Century into the Law Classroom: Stop Being Creative, You May Already be in Trouble’ (2003) 28 *Oklahoma City University Law Review* 223 at 224.

7 A report on the pilot program in Sydney is available at [http://www.cli.nsw.edu.au/cli/files/interactive\\_whiteboard\\_trial\\_easiteach.pdf](http://www.cli.nsw.edu.au/cli/files/interactive_whiteboard_trial_easiteach.pdf). The Victorian approach is summarised in Peter Kent & Matthew Holdway, ‘Interactive Whiteboards, Productive Pedagogies and Literacy Teaching in a Primary Context’ at <http://www.englishliteracyconference.com.au/files/documents/Papers/Non-Refereed%20Papers/Kent%20and%20Holdway%20.pdf>.

8 See Patrick Griffin & Kerry Woods, ‘Report for the Victorian Department of Education and Training’ at [www.englishliteracyconference.com.au/files/documents/Papers/Non-Refereed%20Papers/Kent%20and%20Holdway%20.pdf](http://www.englishliteracyconference.com.au/files/documents/Papers/Non-Refereed%20Papers/Kent%20and%20Holdway%20.pdf).

9 For information on *Clickview*, see <http://www.clickview.com.au>.

10 Kimberlee Weatherall, ‘Fair use, fair dealing: The Copyright Exceptions Review and the Future of Copyright Exceptions in Australia’, Intellectual Property Research Institute of Australia, Occasional Paper No. 3/05 2005.

11 Section 200AB has become known as the ‘flexible dealing’ provision, since being referred to as such in the Attorney General Department’s media release of 14 May 2006 (2006) 14 (4) *Australian Law Librarian* 34.

12 Weatherall, above n 10 referring to the SPAA, ACC, Law Council and APRA/AMCOS submissions.

13 *Ibid*, referring to the Law Council and ACC submissions.

14 *Ibid*, referring to the CAL and APRA/AMCOS submissions.

15 Explanatory Memorandum, CAA [6.55].

16 Note that flexible dealing will not apply if the use would not infringe copyright due to another provision of the CA – including where that provision is subject to special conditions or requirements: s 200AB(6). The latter means that people cannot avoid compulsory licensing schemes by invoking the (unremunerated) flexible dealing exception.

17 CA, s 200AB(7).

18 CA, s 200AB(7).

19 See also Berne Convention for the Protection of Literary and Artistic Works, article 9(2).

20 Emily Hudson, ‘The Copyright Amendment Act 2006: The Scope and Likely Impact of New Library Exceptions’, Melbourne Law School Research Series [2006] *UMelbLRS* 5; (2006) 14(4) *Australian Law Librarian* 28.

21 *Ibid*.

22 *Ibid*.

23 World Trade Organization, United States – Section 110(5) of the US Copyright Act, Report of the Panel, WT/DS160R, 15 June 2000 (WTO Panel Report).

24 WTO Panel Report, above n 23, ss 6.109.

25 *Ibid*, ss 6.110.

26 *Ibid*, ss 6.178.

27 *Ibid*, ss 6.180.

28 *Ibid*, ss 6.182-189.

29 *Ibid*, ss 6.224.

30 *Ibid*, ss 6.229.

31 Raquel Xalabarde, ‘Copyright and Digital Distance Education: the Use of Pre-Existing Works in Distance Education Through the Internet’ *Columbia Journal of Law & the Arts* 26 CLMJLA 101,165.

32 WTO Panel Report, above n 23, ss 6.229.

33 Hudson, above n 20, 36.

34 *Ibid*.

35 Convention on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use, Proposal for Fair Use Guidelines for Educational Multimedia, <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf> (6 August 2008)

36 *Ibid*, ss 1.3.

37 Hampton, above n 6, 236.

38 *Ibid*.

39 Convention on Fair Use, above n 36, 52 ss. 3.2.1.

40 Explanatory Memorandum, CAA, [6.55].