

# Australian Intellectual Property Journal

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## ARTICLES

**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 Australian Law Reform Commission by creating a public interest rulemaking power within an existing Australian copyright institution. It is also proposed to use as the vehicle for the delegation of power an overhauled s 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. .... 83

**“This Is a Complex Issue”: A Few More Questions about Fair Use** – *Graeme Austin*

Taking the lead from the government’s comment that the scope of copyright exceptions is a “complex issue”, this article raises three questions that could benefit from further discussion during deliberations on the Productivity Commission’s recommendation that a US-style fair use standard be incorporated into Australian copyright law. First, it asks whether Australian courts would derive much guidance from US case law, given the doctrinal uncertainty that exists in US fair use jurisprudence. Second, it questions whether an Australian version of fair use would necessarily be applied in cases involving new technological uses of copyright protected works, rather than the production of new works of authorship. Third, it asks whether sufficient attention has been given in the fair use debate to the incentives needed to create functioning markets for copyright-protected works. .... 97

**Three Steps to a Safer Harbour in International Copyright Law** – *Fiona Phillips* ..... 107

