



28 November 2012

The Executive Director
Australian Law Reform Commission
Level 40 MLC Centre
19 Martin Place
Sydney NSW 2000

By Email: copyright@alrc.gov.au

Dear Executive Director,

Re: Copyright and the Digital Economy

In response to a request from the Attorney-General, the Australian Law Reform Commission (**ALRC**) is conducting an Inquiry into the current and further desirable uses of copyright material in the digital economy. The ALRC has released an Issues Paper, *Copyright and the Digital Economy*, inviting submissions from the community.

The Law Institute of Victoria (**LIV**) supports the initiative of reviewing copyright law in the context of the emerging digital economy and welcomes the opportunity to participate in this Inquiry.

INTRODUCTION

The LIV agrees that Australia requires a copyright framework that encourages new opportunities within the digital economy, and that consideration is required to determine whether the current law meets the needs of the developing digital environment.

By way of overarching comments, the LIV believes that:

- Aspects of the current copyright law are complex and uncertain, requiring reform.
- A flexible 'fair use' exception may be a helpful way of simplifying the current copyright exceptions, and providing flexibility for the law to adapt to new future technological developments. In order to promote certainty, examples should be included to set out the sorts of things that might be covered as 'fair use'.
- Alternatively, the existing fair dealing exceptions should be expanded.

The LIV will only respond to selected aspects of the Issues Paper of particular interest.

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GUIDING PRINCIPLES FOR REFORM

Question 2. What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the *Copyright Act 1968* (Cth) (**the Act**) are adequate and appropriate in the digital environment or new exceptions are desirable?

The LIV supports the notion that any reform of current copyright law needs to be underpinned by clear and appropriate principles. The LIV believes that the guiding principles proposed by the ALRC are a sound and sensible foundation.

The LIV emphasises the following principles as being fundamental for informing any copyright reform:

- Copyright law must promote and maintain a delicate balance in respecting the interests of all stakeholders, including rights holders, users and intermediaries.
- Certainty is paramount. Individuals and businesses require clear guidance as to their rights and obligations for dealing with content in the digital context.
- Copyright law needs to be in step with common, established community practice. This is important to promote public perception of copyright law as a constructive, flexible and sensible framework for governing protection and access to content.
- Copyright law must strive to be technology neutral. The focus should be on the intention or purpose of activities (e.g. private and domestic versus commercial exploitation), rather than the type of technology.

CACHING, INDEXING & OTHER INTERNET FUNCTIONS

Question 4. Should the *Copyright Act 1968* (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

As discussed in the Issues Paper, internet service providers, search engines, web hosts and other internet intermediaries rely on indexing and caching as essential technical functions for their efficient operation.

The LIV submits that the current provisions of the Act are inadequate and insufficient to cover these essential technical functions as required by internet intermediaries. This creates an uncertain environment for internet intermediaries, and again results in the law being unsynchronised with common industry practice.

The LIV proposes that the law should be amended to ensure that indexing, caching, and other internet functions required as essential technical functions to provide an efficient service should be clearly carved out as an exception to copyright infringement. In our opinion, this would ideally be achieved under a flexible 'fair use' exception. In this context, caching, indexing and other essential technical functions required for efficient service operation, should be expressly stated as an example of fair use, in order to promote certainty. Alternatively, if the fair dealing approach is retained, then an additional express fair dealing exception should be created.

CLOUD COMPUTING

Question 5. Is Australian copyright law impeding the development or delivery of cloud computing services?

Question 6. Should exceptions in the *Copyright Act 1968* (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

Cloud computing services are an important and significant innovation in the digital environment. Certainty is a key element in allowing the effective development and delivery of cloud computing services.

The Full Federal Court decision, in the Optus TV NOW case¹, provides some guidance in relation to the liability of cloud operators in specific circumstances. However, the decision is specifically expressed as being restricted to its facts. Cloud operators will not automatically be found to have copied content uploaded to their service by customers. Liability will depend on exactly what the cloud operator is doing and how it is done. This leaves the current state of law uncertain in respect of other cloud offerings.

The LIV considers that this lack of certainty may impede the development and delivery of cloud computing services in Australia.

In determining how copyright law should address cloud computing, the rights of cloud operators copyright owners and users, need to be carefully addressed and balanced, whilst encouraging technological innovation. To this end, the LIV submits that the law needs to allow users to access and use legally sourced content across different devices and technologies. Users have a legitimate expectation to be able to manage their legally acquired content in a way that is convenient to them, leveraging technology as a tool. This reflects a technology neutral approach and is likely to stimulate technological innovation.

If an operator is purely hosting a cloud based digital locker service – that is, providing a cloud based facility for customers to store digital content – this of itself should not trigger any liability for copyright infringement. In the LIV's opinion, the hosting of such a service should be exempted from liability, and consider that this is most appropriate dealt with under the safe harbour provisions. The LIV understands that the safe harbour provisions are officially outside the scope of the Terms of Reference, but wish to make the point that pure hosting of cloud digital locker services should not attract any copyright liability.

¹ Insert case reference

COPYING FOR PRIVATE USE

Question 7. Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

Question 8. The format shifting exceptions in the *Copyright Act 1968* (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? ... Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

Question 10. Should the *Copyright Act 1968* (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

Reproducing legally sourced material (eg music, television programs and films) for private use is common practice. The reproductions may be stored on and accessed from a variety of devices including computers, digital discs, personal video recorders, smart phones and tablets.

There is a widespread public expectation that making such copies of legally sourced material should be legally permitted. The LIV considers that if the law significantly diverges from widespread expectation and common community practice, then there is a serious risk that credibility for copyright law will become undermined.

In addition, we submit that the current exceptions for copying for current use are very complex and require clarification.

In the context of these observations, the LIV proposes that the current provisions be amended, in order to promote clarity and to provide a broader basis for copying legally acquired copyright material.

The LIV considers that there is merit in replacing the four current separate format shifting exceptions with a single exception. If a 'fair use' exception is introduced, then it could be framed to include reproductions for private purposes, where the content is legally sourced. In the LIV's opinion, this should be expressly stated as an example of a fair use in order to promote certainty.

If a 'fair use' doctrine is not accepted, then a separate, single exception should be introduced, along the lines of Canada's *Copyright Modernization Act 2012* (Can). The new Canadian provision contains only one exception for the reproductions for private purposes, and it applies to 'a work or other subject-matter or any substantial part of a work or other subject-matter'.² The advantage of such a provision is that it is simple, technology neutral and flexible. To clarify, the exception should be separate from the existing exceptions, and not subject to the requirements of 'fair dealing'.

The current provisions governing the ability of users to make copies to back up their data also require clarification. If a 'fair use' exception is implemented, then it should expressly include reproduction for the purpose of back up and data recovery, for private use, as an instance of fair use. Alternatively, a specific exception should be enacted. In either case, the exception should allow a cloud service provider to 'back up' material on behalf of an individual.

² *Copyright Modernization Act, C-11 2012* (Canada) s 29.22(1).

FAIR USE

Questions 52. Should the *Copyright Act 1968* (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

Question 53. Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

Australian copyright law currently embodies exceptions to copyright based on a closed list of permitted purposes for 'fair dealing'. This can be contrasted with the position in the United States which provides for a broad exception to copyright based on an open list of permitted purposes for 'fair use'. The US law lists factors which must be considered in deciding whether use is fair.

The LIV supports the introduction of a broad and flexible 'fair use' exception, to replace, simplify and clarify the current closed list of 'fair dealing' exceptions. The justification for this position is primarily to promote flexibility. The LIV considers that an open ended fair use exception would allow the law to be more agile in its ability to keep up with technological developments. This in turn, would promote a framework to encourage innovation and investment in technological development in Australia.

One of the concerns about fair use, is that because it is open ended, it is intrinsically uncertain. If businesses had to wait for the court to determine whether a particular use is fair, this might lead to increased transaction costs and general difficulty in structuring business models and activity. To address these concerns, the LIV proposes that:

- Like the US model, Australian law should set out a list of factors to consider in determining whether a use is fair.
- These factors should be similar to those of the US model, meaning that established US jurisprudence could be drawn on for guidance.
- Given the similarity of the US fair use factors with the Australian factors for determining fair dealing, our jurisprudence on when a dealing is fair may also be of assistance.
- Whilst the exception should be open-ended, the Australian Act should set out a non-exhaustive list of examples that would constitute 'fair use'. The sorts of examples that might be listed could include current fair dealing exceptions, as well as those discussed above.

If you would like to discuss any of the matters raised in this submission please do not hesitate to contact me or Angela Gidley, Commercial Law Section Lawyer, on 03 9607 9382.

Yours faithfully,



Michael Holcroft
President

Law Institute of Victoria