



# COPYRIGHT AND THE DIGITAL ECONOMY

ISSUES PAPER

AUSTRALIAN LAW REFORM COMMISSION

AIIA Response

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## INTRODUCTION

AIIA welcomes this opportunity to provide input to the issues paper on copyright and the digital economy. The terms of reference note the need for copyright regimes to provide incentives to create and disseminate original materials and to allow innovation and collaboration for new products and services of public benefit, in the digital economy.

This recognition is most welcome, as Australia moves towards productivity increases and greater efficiencies in sectors such as health, education and government service delivery, on the back of a national high speed broadband facility and internet applications.

The Australian Information Industry Association (AIIA) is the peak national body representing suppliers and providers of a wide range of information technology and communications (ICT) products and services. Its membership comprises approximately 400 of the top international corporations as well as small to medium enterprises currently supplying innovative online applications in the health, education, financial, mining and retail sectors. AIIA members fully support the development of flexible regulatory and legislative frameworks in Australia. More than any other sector, the digital sector requires flexible copyright exceptions to thrive. The current lack of flexibility in Australian copyright law is hindering innovation in the digital economy.

AIIA's National Board of Directors includes all the major corporations currently involved in developments of innovative new applications across global jurisdictions such as Microsoft, Optus, Oracle IBM and Intel, as well as small business organisations providing smart and innovative solutions in the online world today. Our members conduct business all over the world and most are familiar with copyright regimes in other relevant jurisdictions.

## SUMMARY

AIIA believes the ICT industry has a responsibility to successfully develop and exploit the short and longer-term benefits that the internet can deliver to the whole Australian economy, industry, business and consumers alike. Flexible and business-friendly policy frameworks are an essential pre-requisite to the success of this objective. The benefits available from new and original materials developed online under a flexible copyright regime will take many forms; new applications and services for consumers, more competitive business models for businesses, improved service delivery for government. In short, these new and even un-imagined applications can deliver a 'digital economy' to Australia, driving efficiencies across *all economic sectors*. AIIA also considers that the positive impacts of this digital economy supported by business friendly

regulatory regimes, including copyright, will drive much-needed increases in Australia's productivity performance.

As the voice of the digital economy, AIIA is committed to unleashing the potential of the digital economy. AIIA facilitates this by advocating for the immediate implementation of an optimal policy and regulatory environment to enable a successful digital economy and to remove barriers to its effective achievement by focusing on knowledge sharing, education and stimulating innovation.

## REFORM PRINCIPLES

The Paper's Guiding Principles for Reform at pages 19ff are supported by AIIA, but we would add the following comments as more focussed on the issue of facilitating flexible development of the Digital Economy.

1. A thriving digital economy is critical to Australia's economic and cultural future, and the Internet is central to achieving that.
2. The innovations brought about by the Internet have delivered, and will continue to deliver, enormous benefits to creators, users and the underlying economy. They enable creators to make money from their work. They enable users to access a wealth of entertainment, cultural, entertainment and other content. They are driving investment in Australian digital industries.
3. The very nature of the Internet is to make and disseminate copies of information. Digital and Internet technology requires constant, continuous copying of material, often on vast scales and globally. Harnessing the full economic and cultural potential of the Internet requires a copyright regime that can respond in a flexible way to rapid technological changes. More than any other sector, the digital sector requires flexible copyright exceptions to thrive.
4. Digital innovation has put the existing inflexible exceptions regime under increasing strain. The current lack of flexibility in Australian copyright law is hindering innovation in the digital economy. Disruptive innovations such as *cloud-based services and new text mining technologies* are blocked by inflexible copyright law before they even have a chance to get off the ground.
5. We think copyright reform can address this. Flexible, open-ended exceptions can accommodate technological development without undermining the business model of rights holders. They allow courts to make room for new and emerging technologies. The key is to

create exceptions that enable innovative new business models to emerge, producing new opportunities for artists, publishers and other rights owners. An environment that is pro-innovation online benefits right-owners, users, and innovators alike.

6. It's not just today's innovations that matter. Copyright law needs to be future proofed to accommodate unanticipated technological evolution and innovation if tomorrow's digital innovators are to recognize Australia as the best place to introduce new products and services. Flexible exceptions will enable the law to adapt to the next wave of innovation, and the next, unlocking enormous new investments and economic growth.
7. There are a number of ways of introducing greater flexibility. One example is fair use. Other approaches may also prove to be effective. However it is accomplished, some flexibility in copyright is essential if we are to provide breathing space for new legitimate uses and services to evolve. Open-ended, flexible exceptions will always be better than a closed list of permitted purposes at achieving this.
8. Copyright must also be device and technology agnostic wherever possible. Today, an endless array of devices and technologies are used to create and distribute content. Purpose based exceptions, or those tied to particular technologies, risk restricting or impeding technological innovation and investment.

## SPECIFIC RESPONSE

While the Issues paper canvasses many areas of review and exploration, AIIA wishes to comment specifically on Question 26, relating to data and text mining.

**It is our submission that the Act should be amended to provide an exception for the use of copyright material for the purposes of data analytics.**

Data analytics technology provides an efficient and effective approach to help make sense and find meaning in an enormous amount of data, including data that is available on the internet. With the help of Data Analytics, engineers, scientists, scholars, government officials and businesses can gain a greater understanding of the people and the world in which we live in and in turn use this information to innovate and make new discoveries to satisfy the evolving demands of society.

One form of data analytics can require a computer program to crawl through or 'mine' massive amounts of information from a large number of websites. Crawling requires the copying and storage of website materials which are then analysed. The reports that are subsequently generated from such analysis will often contain small fragments of the copied material and this use may

trigger copyright infringement concerns in Australia today.

Websites often have their own Terms of Use but a web crawling computer program cannot read and understand the Terms of Use and how it governs how the website materials are to be used. A more effective method is needed to make a computer program understand whether a website allows or disallows data crawling. Currently, a robots file is broadly used to achieve this goal.

A robots file is a file which is used to manage crawlers and which is understandable by a computer. A robots file can expressly tell a crawler which parts of the website can be accessed by that crawler. This means that a website can prevent a computer program from crawling their website via a robots file.

### **Other Jurisdictions**

The Issues Paper refers to the Hargreaves Report in the UK. In addition to the UK, legal systems of other foreign countries have also either already adopted or are considering adopting new provisions related to analytics technology.

Article 47 of the Japan Copyright Act provides that "For the purpose of information analysis ('information analysis' means to extract information, concerned with languages, sounds, images or other elements constituting such information, from many works or other much information, and to make a comparison, a classification or other statistical analysis of such information; the same shall apply hereinafter in this Article) by using a computer, it shall be permissible to make recording on a memory, or to make adaptation (including a recording of a derivative work created by such adaptation), of a work, to the extent deemed necessary. However, an exception is made of database works which are made for the use by a person who makes an information analysis".

Section 107 of the Copyright Law in the US provides a very broad statutory explanation of what fair use is and sets out four factors to be considered in determining whether or not a particular use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Judges can determine fair use at their own discretion based on the above criteria given the facts in each specific case. AIIA believes the fair use concept will introduce greater flexibility into the

copyright regime in Australia.

## Reform Options

Currently, there is no specific exception under the *Copyright Act 1968* (“the Act”) for data analytics and it is important that any legislative reform continues to encourage research and development in data analytics. **It is our submission that the Act be amended to provide an exception for the use of copyright material for the purposes of data analytics.**

We suggest amending the Act to include a new section under "Division 3—Acts not constituting infringements of copyright in works" (or any other proper place) of the Act which is framed along the lines of the following:

*The extraction of material, information or data from websites or other online sources and storage of such material, information or data by using a computer for the purpose of making a comparison, classification or other analysis of such material, information or data, and distribution of the analysis results, including reasonable portions of such material, information or data, shall not be an infringement of copyright, or breach of license or contract terms except if such extraction is disallowed by the website or other online source owners through the use of either computer readable instructions, or technological measures.*

Such an amendment would ensure that the Act remains current by responding to recent developments in modern technology. Also, a supportive legal climate has the potential to enhance economic growth in Australia by encouraging investment and competition in the expanding business field of data analytics technology.

We also believe that creating such an exception in law will not negatively impact on the original data provider's rights and commercial interests. This is because data analytics technology is not intended to reprint the original data, but to provide a synthesized result of such comparison, classification or other analysis, which will neither interfere with the economic value of the copyrighted material nor compete with it. Restrictions such as a robots file are also sufficient to ensure that the data provider's interests are not affected by the exception proposed above.

AIIA would welcome the opportunity to discuss these comments with the ALRC if required. In the first instance please contact Loretta Johnson at [l.johnson@aiaa.com.au](mailto:l.johnson@aiaa.com.au) or 0427 790 574.