



Electronic Frontiers
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The Executive Director
Australian Law Reform Commission

Via email to: copyright@alrc.gov.au

3rd December 2012

Dear Executive Director,

Thank you for providing the opportunity to make a submission in relation to the ALRC's Inquiry into Copyright and the Digital Economy.

Electronic Frontiers Australia Inc. (EFA) is a national non-profit organisation representing Internet users concerned with on-line rights and freedoms. EFA was established in January 1994 and incorporated under the Associations Incorporation Act (S.A.) in May 1994. Our website address is: www.efa.org.au.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of computer-based communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of computer based communications systems.

EFA policy formulation, decision making and oversight of organisational activities are the responsibility of the EFA Board of Management. The elected Board Members act in a voluntary capacity; they are not remunerated for time spent on EFA activities.

EFA has presented written and oral testimony to State and Federal Parliamentary Committee and government agency inquiries into regulation of the Internet and online issues.

Please find following our responses to some of the questions posed in the Issues Paper. EFA would be pleased to expand on the issues below in oral testimony or otherwise.

Yours faithfully,

David Cake, Chairperson
On behalf of the Board, Electronic Frontiers Australia, Inc.

Guiding principles for reform

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) are adequate and appropriate in the digital environment or new exceptions are desirable?

The basis for Copyright law is to provide a limited monopoly to support investment by those seeking to secure such rights and to provide a fair return to material creators. Copyright laws should strike a balance between the interests of rights holders, public institution uses of content and consumer ability to freely engage with works for personal enjoyment, education and creation.

EFA believes that these principles have been substantially undermined over recent decades by increases to the periods of copyright protection and by onerous enforcement mechanisms imposed by well-resourced rights holders to aggressively protect their rights. These increased enforcement and protection measures have been favoured over the evolution of content business practices to cater for changing technological and market circumstances. The inherent inflexibility within Australia's copyright regime, coupled with increased enforcement and protection measures, has meant other industries, particularly within the IT, education and cultural sectors, are confined to practices lagging well behind current technological developments.

The continual extensions to copyright periods ensure that these periods now bear no resemblance to the original objectives of copyright, to provide protection for a limited period before returning materials to the public domain.

Aggressive enforcement actions and inflexibility in the face of changing technological and market conditions, particularly within the music and movie industries, have led to the discrediting of the entire copyright regime in the eyes of many Australians, particularly younger people. The complexity of the present regime, and references to out-dated technologies, increases disregard for copyright law as being "out of touch" with current realities. The implications of the discrediting of this area of law should not be underestimated as it feeds into a wider disenchantment with the legal system and a general lack of political engagement that has the potential for negative effects on the operation of Australian democracy.

EFA rejects the assertion that unauthorised copying of copyrighted content represents a serious threat to the continued profitability of content creators and owners, thereby threatening the ongoing investment in new content creation and distribution. On the contrary, there is strong evidence that the content industries remain strongly profitable, despite the significant changes in technological and market conditions over the last 10-15 years¹, and EFA believes that promoting greater legitimate access to content will lead to increased revenue for the content industries.

EFA believes that there is clear evidence that the vast bulk of Australian consumers are very willing to consume content legally, where it is available at a fair price, and in a convenient

¹ <http://www.techdirt.com/articles/20120129/17272817580/sky-is-rising-entertainment-industry-is-large-growing-not-shrinking.shtml>

and timely manner. EFA therefore believes that the balance of Australia's copyright regime should be adjusted significantly to ensure that the rights of consumers and other content users to access content according to the principles of fairness, convenience and timeliness are greatly enhanced. EFA believes that this approach will, in the long run, be of benefit to all parties, including content owners.

EFA therefore believes that a broad, flexible, technology-neutral Fair Use exception needs to be introduced into Australian copyright law, and that this will be of great benefit to Australian consumers, educators, creators and content owners.

Caching, indexing and other internet functions

3. What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?

The underlying operations of the internet are based on copying. This is particularly true of web-based and cloud-based services. Australia's current copyright law is excessively restrictive and creates significant impediments to the local development and deployment of a range of internet-based services, leading to a lack of choice for consumers, forcing Australian innovators offshore and dampening growth with the Australian digital economy. It is of great concern for Australia (who aspires to become a leading digital economy by 2020) that, fifteen years after introduction of the AltaVista search engine, a search engine still cannot operate fully from inside Australia due to the inflexibility of the Australian copyright regime.

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?

EFA believes that the Copyright Act should be amended to provide for a broad Fair Use exception that will allow, among many other legitimate uses of copyrighted material, caching, indexing and other uses related to the functioning of the internet.

Cloud computing

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

EFA believes that the recent 'Optus-NRL' case is a clear demonstration of the manner in which the current Australian copyright law is impeding the development and delivery of cloud computing services in Australia. The very narrow interpretation by the Federal Court in this case of the domestic copying exemption has serious implications for cloud computing services based in Australia and could, if not rectified, lead to a serious competitive disadvantage for Australian-based service providers, resulting in a potentially serious impediment to the growth of the Australian digital economy.

The introduction of a Fair Use exception would provide the flexibility required to allow for new technological developments, including cloud-based services. It is also essential that Australia's ability to adopt flexible exceptions for the digital environment not be constrained by trade agreement provisions (as it is believed are currently being negotiated in the Trans-Pacific Partnership Agreement).

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?

EFA believes that the Copyright Act should be amended to provide for a broad Fair Use exception that will allow for the unimpeded development and delivery of cloud computing services offered from within Australia.

Copying for private use

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

EFA believes that legally acquired copyright material, including free to air broadcast material, should be able to be freely copied for personal use, across whatever technological platform is preferred by the individual, to allow for time and format shifting and for backing-up of such material, to prevent loss of data in case of hardware failure.

EFA believes that such personal use/copying should be covered by a Fair Use exception, or alternatively a broad fair dealing right for personal use.

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? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

The existing format-shifting exceptions are overly complex, out-dated and technologically specific. Rather than attempt to define the scope of a format shifting exception that encompasses current types of digital content, or existing devices, EFA maintain that a broad Fair Use exception or fair dealing right for personal use are best suited to our rapidly evolving digital environment.

9. The time shifting exception in s 111 of the Copyright Act 1968 (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

(a) should it matter who makes the recording, if the recording is only for private or domestic use; and

(b) should the exception apply to content made available using the internet or internet protocol television?

EFA supports the adoption of a Fair Use exception or fair dealing right for personal use to encompass technological changes in consumer copying. EFA does not support an exception defining or potentially restricting who may make the copy, types of content that may be copied or the amount that may be copied. EFA also believes that such exceptions should apply across all distribution platforms.

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?

As noted in the response to question 7 above, EFA believes that making copies of copyright material for personal use, including creating back-ups, should not be restricted. EFA believes that the adoption of a Fair Use exception or fair dealing right for personal use is the means to achieve this.

Online use for social, private or domestic purposes

11. How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

Copyright materials are frequently used in social networking contexts. Users frequently ‘share’ their favourite music, images, articles, and video clips with other users. In almost all cases the copyright is not owned by the person sharing, nor however is such a claim usually made. People ‘share’ these materials because they have received some value, e.g. enjoyment, information etc. from the material and wish to share that value with other users.

Social and private use of copyright material, including in social networking contexts, in most instances does not financially benefit the users, nor does it financially penalise the rights holder. What social networking sites allow is the widespread dissemination of material to a larger audience than would be otherwise possible, and this can be of immense benefit to the copyright holder, often leading to increased sales.

12. Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

EFA believes that a broad Fair Use exception is the appropriate mechanism for facilitating legal online use of copyright materials for social, private and domestic purposes. Such uses would include time and format-shifting and creation of back-ups, which should be treated in the same manner, regardless of whether they occur in an offline or online context.

13. How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

It is clear that current restrictions in copyright law do not in practice prevent people from using copyrighted material in this manner, but rather leads them to view those laws as ineffective and unfair. It is therefore arguable that strict copyright laws are actually counter-productive, leading to the emergence of an anti-copyright culture where people have lost respect for any aspect of copyright law. This situation is clearly not of benefit to society as a whole, nor to content owners.

It is a well-known aspect of criminological theory that when individuals are labelled as 'criminals', they tend to take on that label, and it can lead to further criminal behaviour². We really should be trying to avoid labelling young people as criminal simply for creating culture.

EFA believes that a broad Fair Use exception based on criteria of "fairness" is the appropriate approach as this would guard against commercial or other real and unreasonable harm to rights holders, while supporting uses that encourage access to information and the development of culture and creativity.

Transformative use

14. How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

EFA believes that the creation of new material based on existing works, such as the use of parts of songs or videos, is an important part of the cultural lives of many Australians (particularly young people). This is not piracy, it is (re)creation. In fact, the original intent of copyright was not to prohibit new creations it was to encourage them. Realising that there is benefit to society when there is incentive to create, copyright was originally established as a way of encouraging inventors to keep inventing. It was certainly not established to stop any use of already copyrighted material in any way. EFA therefore believes that online uses that involve the creation of new works should be permitted. EFA believes a broad fair use exception is the most appropriate means to achieve this.

15. Should the use of copyright materials in transformative uses be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

17. Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

² Bernard et al, 2010. *Vold's Criminological Theory*, Oxford University Press.

EFA believes that individuals should be free to use copyrighted material as they see fit unless such use unreasonably prejudices the ability of the copyright owner to benefit from their content, i.e. through loss of income. So for example ripping an entire film and distributing it is likely to cause loss of income for the copyright holder. Using 5 seconds of footage from said film in a music video, video mash up, documentary etc arguably would not cause loss of income and if anything probably benefits the copyright holder by broadening their audience and creating greater interest in their content.

Considering the extent to which young people create their own culture by using small parts of copyrighted material (through remixing or sampling music, making video mash ups, making their own movies by putting a favourite song over footage of a party they recently had or by using a small amount of footage from a television series or movie for a video clip of a song they recorded, the making of memes using pictures etc), there is a real risk in labelling this activity – which does not harm the copyright owner and which they rarely financially benefit from themselves – as illegal.

In the United States, the Fair Use exception provides flexibility for individuals using copyright material in transformative ways that are not unreasonably harmful to the copyright holder. EFA believes that Australia should adopt a flexible Fair Use exception rather than attempting to prescribe a purpose-based transformative exception.

Fair use

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?

Inflexibility of the current purpose-based exceptions

The current purpose-based exceptions in the Copyright Act are inherently inflexible and prevent the law from adapting quickly to technological and service delivery innovations. As the pace of technological change has become increasingly rapid, the impact of this inflexibility has become increasingly severe, ensuring that the law now lags years behind the current state of innovation in technology and service delivery. As a result, Australian consumers continue to suffer significant constraints in the range of services available to them, reducing competition in the marketplace, and creating the market conditions that allow Australian consumers to be routinely charged significantly more for digital products than consumers in many other OECD countries.

This inflexibility impedes the development of local internet service providers and advantages offshore service providers, who are able to operate within more flexible copyright regimes, and therefore represents a genuine threat to local technological innovation and the continued development of the digital economy in Australia.

Australia's Copyright Act is therefore no longer fit for purpose in an environment of increasingly rapid innovations in technology and service delivery. The law casts uncertainty

on the legitimacy of basic internet functions like caching and searching, cloud computing, mash ups and remixes, data mining and the personal use of content.

Fair Use

EFA therefore calls for the introduction of a broad provision for fair use, or of a similar open-ended exception into Australian copyright law. Such a provision would apply standards of fairness in the use of copyright material that are already well-established in relation to fair dealing in Section 40(2) of the Copyright Act.

Introducing Fair Use will not adversely affect copyright holders

Introducing a broad Fair Use exception is not likely to adversely affect copyright holders. The Hargreaves Review of Intellectual Property in the United Kingdom, while ultimately deciding against adoption of a Fair Use provision, noted that content industries in the US continue to flourish within the context of a copyright regime incorporating Fair Use. EFA believes the imperative for Australia to adopt a fair use provision is higher than in the UK, as Australia has adopted US-style increased enforcement and protection measures over the past decade, without corresponding flexibility of exceptions.

Most Australians would support a fair use right

Many Australian consumers, when the limitations of fair dealing exceptions are explained to them, roll their eyes in disbelief that the law insists that things they consider to be legitimate everyday activities are in fact illegal. Discussions on this topic tend to ridicule the law, lay blame on large media corporations for preventing what is perceived to be an entitlement to use works in the way they see fit, create a sense of hostility towards those corporations as well as the Government and indeed lead many to view unauthorised downloading as a legitimate reaction to what most see to be unreasonable and unfair limitations. Australians, when educated about these issues, support a change to the law and agree that the introduction of a broad Fair Use exception is very important.

Introducing fair use will further harmonise our copyright laws with other jurisdictions

Citizens of the United States, Singapore and other jurisdictions enjoy broader freedoms than those available in Australia and thus Australian consumers, educators and businesses suffer a comparative disadvantage.

Introducing Fair Use will not increase unauthorised downloads

It is clear from the experience of the United States that the existence of a fair use provision does not lead to an increase in unauthorised downloading of copyright material. On the contrary, a broad Fair Use exception will lead to a greater degree of respect in the community for copyright law and should in fact result in a decrease in unauthorised downloading.

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

EFA believes that existing exceptions should be maintained in the Copyright Act to ensure certainty around these specific uses, but that an overarching broad Fair Use exception should be introduced.

Contracting out

54. Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

Increasingly, materials are being made available online in digital form, often exclusively, and access to these materials, whether paid or not, is becoming increasingly subject to terms and conditions of the contract/licence of use. These terms and conditions often exclude the exceptions to infringement provided for in the Act, resulting in access to many electronic resources being on a more limited basis than when those materials are available in hardcopy, thus creating a two tier system of access & usage.

EFA therefore strongly believes that agreements which purport to exclude or limit copyright exceptions should not be enforceable. Allowing such 'contracting-out' of exceptions can already be seen to limit the applicability of those exceptions, and would undermine any extensions to exceptions, such as a broad Fair Use exception.

55. Should the Copyright Act 1968 (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

EFA believes that the Copyright Act should be amended to include a broad principle of fair use and that contracting-out of this principle should not be permitted.