ALRC Inquiry into Copyright and the Digital Economy Submission in response to Discussion Paper 79

Unreliable Evidence on Fair Use

By

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Introduction & Outline

The Australian Law Reform Commission (ALRC) has recommended that Australia adopt a flexible fair use copyright exception. In support, the ALRC's recent discussion paper makes three references to a study published in October 2012, by economic consultants, Roya Ghafele and Benjamin Gibert entitled, "The economic value of fair use in copyright law: Counterfactual impact analysis of fair use policy on private copying technology and copyright markets in Singapore". The study by Ghafele and Gibet (G&G) analyses the economic impact of Singapore's open-ended fair dealing provisions, which include a multi-factor test of fair use similar to that proposed by the ALRC.

In what follows we first outline why in our view the ALRC appears to attach credibility and place some reliance on this study. We then present reasons for serious concern about the reliability of the study and its conclusions. Based on our review, we feel that it would be unwise to rely on the G&G study as proving the case for fair use.

ALRC's Apparent Reliance on the Singapore Fair Use Study

The ALRC first reference to the Ghafele and Gibet (G&G) study appears to give *credibility* to the report's claims that the introduction of fair use in Singapore had a positive net economic impact. The ALRC's first reference to the study was in chapter 3 where the ALRC discusses the concept of the digital economy and its implications for copyright law. In a stand- alone paragraph 3.6 the ALRC refers to the report and simply states:

> 3.26 Commissioned research on the economic benefits of fair use in copyright law, using Singapore as a case study, found copyright industries to be 'relatively unaffected' by the introduction of fair use although significant stimulation of growth in private copying technology occurred.

The lack of any qualifying statement here seems to imply the ALRC simply accepted the reports two key findings on face value, implying that fair use might be expected to cause only

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negligible harm to copyright industries, which in turn would be offset by significant benefits to copying industries.

The ALRC again makes an unqualified reference to the study in chapter four of the discussion paper, where the ALRC makes its case for reform. This context to the reference suggests that the ALRC not only attaches credibility to the report, but also may have placed some *reliance* on the G&G results in formulating its proposals for reform. The ALRC reference to the G&G study in chapter 4 occurs in footnote 184 to paragraph 4.100 as authority for claims "that fair use would not necessarily cause economic harm to rights holders"

The apparent credibility and then reliance placed on the G&G studies results by the ALRC is reinforced later when the ALRC again makes reference to the study in chapter 5 as authority for claims "that exceptions to allow the making of private and domestic copies encourage the development of innovative and efficient services and consumer products". In footnote 19 to this statement the ALRC comments as follows:

> 19 For example, one recent study found that a fair use policy in Singapore positively influenced growth rates in the private copying technology industries: R Ghafele and B Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore* (2012), prepared for Google.

Again this summary of the G&G study result lacks any qualifying statement and seems to imply the ALRC simply accepted the report's findings on face value.

Given the ALRC's failure to mention any reservations with the G&G report, we would like to take the opportunity to correct the record and provide our evaluation of its credibility and reliability for purposes of policy formulation in a law reform context.

Reliability and Credibility of the Singapore Fair Use Study.

In their report G&G conclude that "fair use policy positively influences growth rates in private copying technologies … Prior to the amendment of fair use policies, private copying technology industries experienced -1.97% average annual growth. After the changes were introduced, the same industries enjoyed a 10.18% average annual growth". The increase in growth amounted to a gain of 2.27 billion Euros in value-added over a five-year period.

These effects are remarkable and huge (not merely large). However, we are concerned that the research of G&G does not support the rosy projection about the impact of fair use on economic growth. Their difference-in-differences analysis focuses on private copying technology and copyright industries and compares their growth rates of value added against that of a control group of industries. Both focal and control industry groups included businesses at three levels -- manufacturers, wholesalers, and retailers. The analysis compared the growth of value added in the five years before 2005, when the fair use exception came into effect, with the growth in the five years from 2005 onward.

As mentioned above, G&G found a significant positive effect on the growth of the copying technology industries (the effect was significant at the 10% level). They also found a negative effect on the growth of the copyright industries, but the result was not statistically significant.

While we have multiple concerns with the econometric analysis, we focus here on the two most serious. One is the identification strategy, and the other is the sample construction.

Applied to assess the impact of Singapore's enactment of a flexible fair use-type exception in copyright law, the key assumption underlying the difference-in-differences analysis is that the exception was the only relevant change in law or policy around the year 2005. This assumption is necessary for attributing any difference in the growth of value added between the focal and control industries to the provision for fair use.

However, the assumption is false. In 2004, Singapore revised all of its major intellectual property laws –the Patents Act, Copyright Act, Registered Design Act, and Trademark Act, in part to comply with commitments made under the U.S.-Singapore Free Trade Agreement.

The patent revisions included a new system of examination including post-grant examination, stricter requirements for obtaining or invalidating a patent, a new right to sue for infringement and a limitation on remedies for infringement. These revisions were so substantial that a law firm described them as fundamental (Marks and Clerk [date]).

Patent law is obviously important to the copying technology group of industries, which includes manufacturers of computers, digital storage media, and smart cards. It is also of obvious importance to the control group of industries, which includes manufacturers of networking devices, wireless equipment, and optical instruments. Indeed, for these industries, patent law is quite likely more important than copyright law.

The amendments to the Copyright Act were even more substantial and amounted to 87 pages. The amendments included expansion of the scope of copyright to encompass digital media, new rights of communication to the public, exceptions for educational institutions, provision for statutory damages and other new remedies, criminal penalties, *as well as a new open-ended provision for fair dealing that included a fair-use type multi-factor test*. Any of these provisions would possibly affect the copying technology and copyright groups of industries. It seems quite challenging to single out fair dealing as more important than any of the other changes.

Our other fundamental concern with the econometric analysis of G&G is the composition of the copying technology and control groups of industries. The bulk of the two groups belong to electronics manufacturing sector. In 2005, the value-added of all Singapore electronics manufacturing industries was $79 billion, of which $75.3 billion was exported.

G&G argue that allowing for fair use would stimulate the demand for computers, digital storage media, smart cards, and other electronic devices. Being able to make fair use of hitherto copyrighted content, buyers would get more benefit from such devices and so increase their purchases.

The trouble with this line of reasoning is that over 95% ($75.3 billion of $79 billion) of electronics manufactured in Singapore were exported. The export percentage is actually higher with accounting for purchases by tourists at Singapore's famous electronics malls. So, the copyright law that actually influences the demand for Singapore-made electronics is that of the United States and other importers of Singapore-made electronics.

Conclusion

As economists, we are keen to see research into the costs and benefits of an exception for fair use.   However, given the two serious issues with the G&G study, we feel that it would be unwise to rely on their analysis as proving the case for fair use.