

Internet industry Association

Submission to

Australian Law Reform Commission

Discussion Paper (DP 79)

Copyright and the Digital Economy

July 2013

The Executive Director
Australian Law Reform Commission
GPO box 3708
Sydney NSW 2001

By e-mail: copyright@alrc.gov.au

Dear Sir or Madam,

Copyright and the Digital Economy

The Internet Industry Association (**IIA**) of Australia is pleased to make the following submission in response to the Australian Law Reform Commission (**ALRC**) *Copyright in the Digital Economy Discussion Paper*. The IIA has chosen not to address every issue raised by the Discussion Paper but instead to focus on those issues relevant to its members.

About the IIA

As the leading body representing Australia's Internet industries, the IIA is dedicated to delivering the ongoing leadership and support needed to collectively drive our Digital Economy forward.

We believe confidence in the Internet is the key to development of the Digital Economy in Australia.

We aim to build confidence in the Internet for Australian business and consumers by providing resources, accreditation, best practice guidelines, industry representation and helping to protect privacy, safety and security online.

The Case for Fair Use in Australia

The ALRC has recommended that Australia replace the existing fair dealing provisions and numerous associated specific use exceptions with a fair use right based on four fairness factors and nine illustrative purposes.

The non-exhaustive list of fairness factors being:

1. the purpose and character of the use;
2. the nature of the copyright material used;
3. in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
4. the effect of the use upon the potential market for, or value of, the copyright material;

and the non-exhaustive list of illustrative purposes as follows:

1. research or study;
2. criticism or review;
3. parody or satire;
4. reporting news;

5. non-consumptive;
6. private and domestic;
7. quotation;
8. education; and
9. public administration

The IIA supports this over-arching recommendation for fair use. The IIA believes that the approach suggested would better accommodate the many and various cases of "non-consumptive" copying that are common place in the digital economy. However, the IIA would make the following points:

- The fairness factors appear to represent a summary of the principles that are behind many of the specific exceptions that are currently in the *Copyright Act 1968* (Cth) (**Act**). The IIA agrees that by changing the law to express broadly applicable underlying principles the law is likely to be more fair (i.e. not just reflecting the expression of particular instances of lobbying or the needs of "point in time" technologies) and better suited to accommodate new technologies, applications and delivery platforms.
- To the extent that specific exceptions in the Act are seriously out of date (for example the exception for backing up in s47C and the exception for reverse engineering and interoperability in s47B and s47D both of which are too narrow, or time and format shifting exceptions which are technology specific) it would seem a futile exercise to update these to the latest view of what might be required. The IIA believes the principles based approach proposed by the ALRC is a better alternative.
- Concerns have been expressed by copyright owners that the introduction of "fair use" would significantly expand rights of users to engage in unremunerated exploitation of proprietary material. The IIA believes that there is little or no evidence to support that this would be the case. In some cases the fairness factors may operate to allow narrower scope of use than is currently allowed. The fourth fairness factor would operate to protect damage to the copyright owner's commercial interests.
- A number of submissions to the Issues Paper expressed a view that might be construed as "if it ain't broke, don't fix it". The premise being that there is no evidence that the existing copyright exceptions are inhibiting the development of online commerce in Australia. With respect, this "no evidence" position is very self-serving, is counter to the contents within submissions of a number of major organisations within the IT sector and we support the ARLC's view that it should be rejected. Australian copyright law would better accommodate the development of the digital economy by the adoption of the proposed fair use test.
- The IIA supports the addition of the 4 new illustrative purposes in addition to including the existing fair dealing exceptions as illustrative purposes. Of particular importance to the IT sector is the inclusion of "non-consumptive use" as an illustrative purpose. However, please refer to our comments below in relation to third party copying.
- The IIA would seek to add "transformative" to the list of illustrative purposes. We note that the ALRC does not propose that any new specific transformative use exception should be introduced, even if a fair use exception is not, based on the view of the

difficulties involved in framing such an exception ¹. However we note that the concept of transformation is well developed in US law and is regarded as an important basis for recognising fair use, particularly in cases where a sufficient public benefit can be attributed from any appropriation.

Much like "non-consumptive use" transformative uses employ the original copyright material not to be used and enjoyed for its original purpose but to form part of a new work that communicates new ideas and is the result of original intellectual effort: in the context of the four fairness factors, this is a legitimate form of fair use. The IIA fears that transformative use may not be sufficiently or clearly recognised by the courts in Australia if it is not mentioned as a specific illustrative purpose.

Statutory licences

The IIA does not have a position on statutory licensing schemes for educational copying other than to comment that the market based approach suggested by the ALRC would allow owners and users to make their own arrangements and remove the complexity of the legislative framework that currently exists.

Third Parties

The IIA agrees with the ALRC to the extent that the ALRC expresses reservations in relation to the decision in Optus TV Now. In particular, as stated in our submission to the Issues Paper, the IIA has serious reservations regarding the finding that the provider of an online service can be the maker or the joint maker of a copy when the process of selecting the content and causing the technology to make the copy is undertaken entirely by the user.

The history of the development of IT in the late 20th century to the present day can be tracked in terms of movement back and forth between centralised computing power and distributed computing. The law of copyright should not favour single user devices such as the iPod or the personal video recorder (distributed computing) over identical functionality provided as a service over the internet or other network (centralised computing).

In that context, the IIA makes the following points:

- Cloud computing offers enormous social and economic advantages by allowing sharing of computing resources and thereby achieving economies of scale and minimising power and hardware requirements. It also reduces the need to transport information and the device required by the user to achieve the same result. The law proposed by the ALRC provides a positive disincentive to moving services into the cloud by positively involving the service provider in the choices of the user when using the service.
- The argument that the service provider should be jointly responsible for the copying because they are closely involved with the complex choices made in the copying process (having designed or authorised the system) does not distinguish device-based copying from cloud-based copying: both have this characteristic.
- The argument that online service providers benefit from the copying because they are paid for providing the services (by subscription, rental or selling advertisements)

¹ ALRC - Copyright and the Digital Economy Discussion Paper, Chapter 10.

is also not a distinction. The makers of devices used in the home also make money (sometimes larger amounts than service providers) by selling those devices into the home. In some cases devices that are provided in the home are leased or rented. In this instance, we don't believe it could be reasonably argued that the rental provider of a PVR should be held responsible for the illegal copying made by users.

The IIA recognises that a fair use test has a role to play where an online service provider is selecting and presenting third party content. However, the IIA strongly urges the ARLC to review its position on third party use to a position that makes a clear distinction between providing technology and services to a user that facilitate user activity (in such cases the user should be responsible for use of copyright) whatever the device or service and other cases where the service provider selects and delivers the content.

Where the user is responsible for selection and use of content the rules relating to authorisation of infringement of copyright are sufficient to ensure that the service provider recognises the interests of rights holders.

We suggest an approach whereby the Act is amended to make it clear that "non-consumptive use" covers all cases where a service provider is making available a device or a service for a third party (whether supported by Advertisements, by rental or license) and that, accordingly the test of whether a product or service that involves copying of third party subject matter is infringing copyright should be tested against the right of the user to make and otherwise exploit the relevant copies.

We are not saying that parties engaged in providing devices or services should have immunity to actions for infringement where the user is making unauthorised copies by using the service. As stated above, it is our view that the proper test for liability of a service provider in these circumstances is whether they engaged in authorisation of infringement of copyright. The service provider should not be treated as if it is a direct infringer or joint maker of copies.

As stated in our submission to the Issues Paper, IIA believes that the current state of copyright in Australia as it relates to third party services directly impedes innovation and the development of the digital economy.

The decision of the Full Federal Court in *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) (TV Now) has created a situation where Australian copyright:

- **is not technology neutral:** action taken using a purchased or leased home device such as a PVR is regarded as not involving the maker or provider of the device in reproduction of copyright subject matter. Whereas the same action taken using a remotely located system, where access is rented or licensed, involves the service provider as a sole or joint maker of the copyright subject matter;
- **discourages the use of cloud services:** if the provider of a cloud service is a joint or sole maker of reproductions of copyright subject matter selected by the customer (as the law now appears to be), the provider of the service presents as the best party to sue if the customer uses the service for infringing activity: whether or not the service provider was aware of or encouraged the infringement. Also, because services providers are deemed the "makers" of copies, their services cannot facilitate the enjoyment by users of exceptions that are otherwise available to them under the Act; and

- **departs from a conventional "cause and effect" approach to the making of a copy of a copyright subject matter.** The finding of the Full Federal Court in the TV Now decision is a surprising departure from the traditional way of determining who is the maker of a copy of a copyright work. The traditional approach provided a "bright line" that was easy to determine and, in our view, deliberately supported the creation of new and innovative products provided they did not have the sole purpose or function of facilitating the infringement of copyright. eBay submits that it is in the strong interests of the digital economy in Australia that the "bright line" be restored and, in particular, that no distinction be made between online services provided under licence, devices purchased by the user and/or any combination of the same.

Who is the maker of a copy?

In order to determine who the maker of a copy is, for the purposes of copyright infringement, the relevant enquiry is to determine the identity of the legal person who undertook the infringing act. To identify the legal person in question, one must ask who produced a "material thing by giving a certain form to a portion of matter". This definition of "make" comes from the Oxford English Dictionary and was approved in TV Now.

In *Roadshow Films Pty Ltd v iiNet Ltd* (No 3) [2010] FCA 24, Cowdroy J explored nature of Bit-Torrent and the interaction between the user and the "swarm", the swarm being the connected network of participants in the Bit-Torrent system. Under his analysis, the "swarm" itself was an entity, where the "electronic transmission" occurs between the peer and the swarm. Cowdroy J found that, where a user transmitted a substantial part of a work to the swarm, it was the user, not the swarm, which would be liable for infringement through their electronic transmission of the file to the swarm.

Accordingly, a communication to the swarm was found to be a "communication to the public". This was on the basis that it is the user who "chooses a particular .torrent file, connects to that swarm" and makes the electronic transmission. Cowdroy J found that it was the user, not iiNet, the technology provider, that would be liable for copyright infringement:

"[324] As already mentioned, the court does not consider the relevant "electronic transmission" to be the transmission of each piece of a film between an iiNet user and a peer in the swarm, but rather between the iiNet user and the swarm itself. Consequently, the issues arising regarding the person who makes or originates the communication do not arise under the court's construction of the "electronic transmission" right in the present circumstances. It is clear that the person responsible for determining the content of the communication is the iiNet user who chooses a particular .torrent file, connects to that swarm, and, over time, "electronically transmits" to that swarm the file as they themselves receive pieces of it. The effect of s 22(6A) would appear to be that the iiNet user cannot be said to "electronically transmit" if they receive data from the swarm. However, as has been made clear, the "electronic transmission" is from the iiNet user to the swarm."

Tamberlin J also considered the scope of section 22(6) of the Act in relation to determining the person responsible for the content of the communication in *Universal Music Australia Pty Ltd and Others v Cooper and Others* [2005] FCA 972.

Although in a slightly different context (MP3s4Free website which hosted infringing copies of MP3 music files), Tamberlin J interpreted the person responsible for the communication as the person who determines, formulates or creates the relevant content:

"[74] On the natural and ordinary meaning of the words used in s 22(6), in the context of the present dispute, I do not think it can be said that a person who is the proprietor, manager or operator of a website which provides hyperlinks to other websites on which the sound recordings are hosted determines the content of the communication. It is artificial in the extreme to suggest that the person or body who facilitates access from the website to a remote site and provides a trigger which enables sound recordings to be downloaded from that remote site is responsible for the content of the communication from the remote website. The fact is that, on the evidence, Cooper does not "determine", "formulate" or "create" the content of the remote website from which the communication takes place."

...
[76] It is the entitlement and role of the designer, operator and owner of a remote website to determine what is placed on that website and therefore what is the "content" of that website. If the content includes infringing copyright material, then the responsibility for that lies with the person or persons who place that material on the remote website and thereby make it available for transmission to the public. This is consistent with the "Digital Agenda Copyright Amendments: Exposure Draft and Commentary" (February 1999)."

This test of "determining the content" emulates the content of the Second Reading Speech for the Copyright Amendment (Digital Agenda) Act 2000 where it is stated that:

"Under the amendments, therefore, carriers and Internet Service Providers will not be directly liable for communicating material to the public if they are not responsible for determining the content of the material. This is a key underlying principle in the government's approach to regulating the new technological environment."

Orphan works

The IIA supports the approach to orphan works described by the ALRC; the framework described seems reasonable and would be of benefit to many businesses operating in digital media.

Retransmission of Free-to air Broadcasts

The IIA supports Proposal 15-1, Option 2 in the Discussion Paper that, the exception to broadcast copyright provided by the *Broadcasting Services Act 1992 (BSA)*, and applying to the retransmission of free-to-air broadcasts, should be repealed and replaced with a statutory licence.

The IIA recognises that Proposal 15-1, Option 1 in the Discussion Paper is platform neutral and consistent with the right of broadcasters to control the retransmission of broadcasts in line with International norms. However, the IIA believes that implementing Option 1 could be highly disruptive in terms of existing services to the public and existing service providers.

Free-to-air television is supported by advertising that is sold on the basis of audience reach. Accordingly, extending retransmission to include retransmission over the internet (subject to in license area geo-blocking) will benefit the broadcasters and create technological neutrality between those media organisations able to deliver programed services over cable and those who wish to do so over the internet. Broadcasters would also benefit from the expansion of the statutory license scheme to cover broadcast copyright. As such, the IIA supports expansion of the statutory licence scheme as proposed by the ALRC.

Broadcasting

The exceptions to infringement of copyright that currently benefit broadcasters should be expanded to cover transmission over the internet. The current situation is anomalous in that:

- the definition of "Broadcasting Service" in the BSA excludes point to point services;
- it has been argued that streaming of live or pre-programmed (i.e. not on demand) material over the internet is "point to multipoint" (conceptually true but not true in terms of the operation of the technology) and therefore is broadcasting in any event.; and
- the matter was put beyond doubt by the 2001 Ministerial Determination made by Senator Alston but recently disputed by Commercial Radio Australia in *PPCA v CRA [2013] FCAFC 11 (13 February 2013)*

Interestingly, the judgement in the PPCA appeal decision included an observation that if online streaming is within the definition of broadcasting in the BSA, then those licensed radio stations that have been streaming over the internet have been doing so in breach of the licence condition that the broadcast only within their license area.

In order to develop a technology neutral, logical and consistent regime in this area, the IIA would support the following changes:

- The regulatory regime that applies under the BSA should not determine who is entitled to broadcast copyright. The regulation of broadcast services should be separate and unrelated to whether or not copyright subsists in a transmission.
- Broadcast copyright should subsist in any transmission over the internet and belong to the party sending the transmission (not the owner of the technology making the transmission) including transmissions "on demand" being transmission where the user selects the precise content and determines the start time of the transmission. Transmission over the internet should include any transmission whether or not it is to one or more recipients and whether or not it is received by the recipients at exactly the same time. This condition is important because increasing streamed services over the internet are both pre-programmed and customised to the user's preferences. In our view there is no reason why a radio station that give all its listeners exactly the same music and a radio station that give each user its own personalised experience should have different rights in relation to protection of the signal.
- This would mean that in the case of live streams or streams of program material broadcast copyright would subsist in the person sending the stream.

Contracting out

The IIA supports including a provision in the Act that prohibits contracting out of any/all fair use/ fair dealing exceptions. The IIA believes particularly that the framework of fair use factors provides sufficient protection for copyright owners but may not protect copyright users if they can be required to contract out of fair use rights as a condition of purchase, licensing or use.

Conclusion

The IIA congratulates the ALRC on an excellent and well considered report. The IIA respectfully requests that the ALRC take into account the views expressed in this submission and the IIA's previous submission to the Issues Paper in formulating its final recommendations and looks forward to the ALRC issuing its Final Report in November 2013.
