17. Computer Programs and Back-ups

Contents

Summary

17.1 This chapter discusses exceptions to copyright for computer programs and the need for an exception for backing-up all types of copyright material.

17.2 The use of legally-acquired copyright material—including films, music, ebooks and computer programs—for the purpose of back-up and data recovery should be considered under the fair use exception. For the exception to apply, making back-up copies must be fair, having regard to, among other factors, harm to rights holders' markets. The ALRC considers that such uses are likely to be found to be fair.

17.3 If fair use is enacted, there may also be a case for repealing or amending the existing exceptions for computer programs. However, further consultation should be conducted before repealing these exceptions.

Back-ups and fair use

17.4 Part III div 4A of the *Copyright Act* includes exceptions to copyright for computer programs. One of these exceptions, in s 47C, is for backing-up computer programs. There is no comparable exception for backing-up other copyright material.

17.5 Despite this, there can be little doubt that many Australians and Australian businesses routinely make back-up copies of their digital files. Many would be surprised to hear that making copies of this material for these purposes may infringe copyright.

17.6 The ALRC considers that the use of copyright material for the purpose of back-up and data recovery should be considered under the fair use exception recommended in Chapter 4.

17.7 Many stakeholders submitted that there should be an exception to allow consumers to back-up their digital possessions without infringing copyright. Many stressed the importance of protecting consumers' rights and meeting reasonable consumer expectations.

17.8 Electronic Frontiers Australia, for example, stated that back-up and data recovery 'should not infringe copyright in any circumstances, particularly where it involves an individual backing-up their own legally acquired data'.[1] Likewise, eBay stated that the existing exception in s 47C is 'complex and unacceptably narrow' and that it is 'vital in a digital economy that the owners of digital copyright material have the right to protect digital purchases by making backup copies'.[2] The Internet Industry Association also submitted that exceptions for back-up should not distinguish between different types of digital content:

> Backing up should not require a further permission of the copyright owner and should not be restricted as to the technology used or the place where the stored copy is made or held.[3]

17.9 Many submitted that a fair use exception, rather than new specific exceptions for back-up and data recovery, should be applied to determine whether an unlicensed use of copyright material for back-up purposes infringes copyright.[4] For example, Dr Rebecca Giblin submitted that

> a narrow purpose-based exception would be poorly adapted to the changing technological environment and potentially hinder the development and uptake of new back-up and recovery technologies. A flexible exception in the style of fair use would be a far preferable method of achieving the same aims.[5]

17.10 Ericsson also said it 'strongly supports the application of the fair use exception when determining whether a use of copyright material, for the purpose of backup and data recovery, infringes copyright'.[6]

17.11 The Arts Law Centre, on the other hand, favoured a 'specific exception allowing individual consumers to make back-up copyrighted material such as images, ebooks, audio and audio-visual material that have been legally-acquired'.

> The sole purpose for the back-up would be in case the source copy is lost, damaged or otherwise rendered unusable as provided, for example, as provided for in the Canadian Copyright Act.[7]

17.12 Other stakeholders expressed concern about exceptions for the purpose of back-up and data recovery. Modern business models often involve contracts with consumers to allow them to make copies of copyright works for the purposes of back-up and data recovery, and so, it was argued, an exception is either not necessary, or would harm the rights holders' interests. The Australian Film and TV Bodies, for example, submitted that there is

> substantial evidence of online business models and content delivery services that permit a consumer to re-download or re-stream content if another copy is legitimately required. iTunes is a popular example. The introduction of a right of back-up for any

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1 EFA, *Submission 714*.
2 eBay, *Submission 751*.
3 Internet Industry Association, *Submission 253*.
4 Whether making back-up copies is fair use does not appear to have been properly tested in US courts.
5 R Giblin, *Submission 251*. See also EFA, *Submission 258*.
6 Ericsson Australia, *Submission 597*.
7 Arts Law Centre of Australia, *Submission 706*.

> content downloaded from iTunes would undercut existing licensing models and therein licensees' ability to offer specific licence conditions for authorised content (including at different price points).[8]

17.13 APRA/AMCOS also expressed concern that a new exception might interfere with established markets.[9] Similarly, ARIA submitted that the ability to make back-up copies of copyright material is being

> addressed through the commercial models already operating in the market, with download stores allowing consumers to make additional copies of recordings under the terms of the licensed service. Therefore an additional exception for this purpose is unnecessary and unjustified.[10]

17.14 The Interactive Games and Entertainment Association submitted that business models are addressing users' desire to back-up content. Users can often re-download a game 'multiple times if for any reason they accidentally, or intentionally, remove the game from their device'.[11]

17.15 Some stakeholders expressed concern that new exceptions to copyright might allow users to copy copyright material which they are only entitled to access for a limited time or for so long as they pay an ongoing subscription fee. A subscription to a magazine, for example, may come with access to digital copies of the magazine's entire back catalogue. Subscribers should not then be free to copy and keep that entire back catalogue. APRA/AMCOS submitted that if exceptions extended to the back-up of 'tethered' downloads, it would have a 'chilling effect on innovation' and 'may lead to the exit from the Australian market of Spotify, Rdio and others'.[12]

17.16 Similarly, Foxtel submitted that it makes content available to its subscribers to stream or download for a limited time, and this period of time is usually determined by the content owner. If copyright exceptions allowed subscribers to copy this content, 'this would conflict with Foxtel's and/or the rights holder's ability to exploit that content at a later time'.[13] Foxtel submitted that an exception for making back-up copies would risk 'undermining the ability for content owners and distributors to monetise their content and extract fair value from distribution windows'.[14]

17.17 Copying such 'tethered' downloads would not be fair use. Further, such distinctions between fair and unfair copying for private purposes or the purpose of keeping back-up copies, highlights the benefit of having a flexible, principled exception like fair use.

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8 Australian Film/TV Bodies, *Submission 205*. See also Screen Producers Association of Australia, *Submission 281*.
9 APRA/AMCOS, *Submission 247*.
10 ARIA, *Submission 241*.
11 iGEA, *Submission 192*.
12 APRA/AMCOS, *Submission 247*.
13 Foxtel, *Submission 245*.
14 Ibid.

17.18 Third parties increasingly offer data back-up and retrieval services, often allowing users to store their digital belongings on remote servers in the cloud. Some of these services will automatically scan a customer's computer, and upload files to a remote server. Many stakeholders stated that third parties should be able to offer such cloud-based back-up services. For example, the ADA and ALCC submitted that exceptions 'must account for consumers and organisations "making" copies of information for back-up purposes, and service providers who facilitate back-up automatically, on their behalf'.[15]

17.19 Telstra submitted that exceptions should allow cloud service operators to back-up and store legally-acquired material on behalf of their customers, but should not be able to 'commercially exploit material under the protection of a private use exception'.[16]

17.20 The use of copyright material by some back-up and data recovery services may well be fair use. Although commercial, some such services may be transformative and may not harm the markets of rights holders.

17.21 A program or cloud-based service that backs-up and stores the entire contents of a hard drive—all programs and files, including music and films—may be distinguished from services that, for example, store and allow remote access to a customer's music and films. The latter service is now offered by many rights holders; an unlicensed service that unfairly competes with and harms this market may well be unfair. The former service, however, may be a transformative and fair use.

17.22 Using copyright material for back-up and data recovery purposes should often be fair use. Rather than propose new or extended exceptions for this activity, as were enacted in Canada in 2013,[17] the ALRC proposes that the fair use exception should be used to determine whether such uses infringe copyright.

17.23 Some stakeholders submitted that the fair use exception could expressly refer to reproduction for the purpose of back-up and data recovery.[18] However, the ALRC does not consider that this is a sufficiently broad category of use to justify including it as an illustrative purpose of fair use—and in any event, not every good example of fair use can be listed in the provision.

17.24 If fair use is enacted, the existing specific exception in s 47C of the *Copyright Act* for making back-up copies of computer programs should be repealed. If fair use is not enacted, then a new specific exception for back-up and data recovery should be introduced, and should apply to the use (not merely reproduction) of all copyright material (not merely computer programs).

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15 ADA and ALCC, *Submission 213*.

16 Telstra Corporation Limited, *Submission 222*. See also Music Council of Australia, *Submission 269*.

17 Section 29.24 of the *Copyright Act 1985* (Can) applies broadly to 'a work or other subject-matter'. The person who owns or has a licence to use the source copy may reproduce it 'solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable'. The copy is limited to personal use, the original must not be an infringing copy, the person must not circumvent a TPM to make the copy, and the person must not give away any of the reproductions.

18 See, eg, Telstra Corporation Limited, *Submission 222*; Law Institute of Victoria, *Submission 198*.

Exceptions for computer programs

17.25 In addition to the exception for backing-up, there are other exceptions for computer programs in pt III div 4A of the *Copyright Act*, namely:

- reproduction for normal use or study of computer programs (s 47B);
- reproducing computer programs to make interoperable products (s 47D);
- reproducing computer programs to correct errors (s 47E); and
- reproducing computer programs for security testing (s 47F).

17.26 Contracts that exclude the operation of these exceptions are largely unenforceable.[19]

17.27 These exceptions were introduced, and one was amended, by the *Copyright Amendment (Computer Programs) Act 1999*, following a 1995 Copyright Law Review Committee report on computer software.[20] The Explanatory Memorandum explained the objectives of the new provisions:

> The objectives of allowing decompilation are: a) for interoperability—to put Australian software developers on a competitive footing with their counterparts in Europe and the USA and increase the range of locally produced interoperable computer products available to the wider community; b) for error correction, including combating the potential disruption to business and the community by the Y2K bug in many computer programs; and c) for security testing—to combat the potential disruption to business and the community by computer hackers and viruses.[21]

17.28 A few stakeholders commented on the importance of exceptions for computer programs. The ADA and ALCC stated:

> The activities covered by the computer software exceptions are critical to ensuring that computer programs and IT networks work safely and securely. These exceptions are particularly important in an environment where homes and business are becoming increasingly connected to the internet and are reliant on computer software for performing everyday tasks. Ensuring that computer software can be reverse engineered to enable the creation of interoperable products is also an important competition goal.[22]

17.29 The computer program exceptions attracted limited comment in the initial stages of this Inquiry, however some stakeholders pointed out a number of problems with them.[23] Robert Xavier submitted that the definition of computer program is too narrow, as it is too often confined to 'literary works', which would not cover images, audio and films that are often part of computer programs, such as computer games.[24]

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19 *Copyright Act 1968* (Cth) s 47H.
20 Copyright Law Review Committee, *Computer Software Protection* (1995).
21 Explanatory Memorandum, Copyright Amendment (Computer Programs) Bill 1999 (Cth).
22 ADA and ALCC, *Submission 586*.
23 R Xavier, *Submission 531*; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.
24 R Xavier, *Submission 531*.

17.30 The exception for making interoperable products in s 47D seems to be the most problematic, and was said to be ineffective for a number of reasons. It does not allow programs to be 'reproduced in the interoperable program, which severely limits its use'.[25] It 'does not appear to extend to copying necessary to make software work with hardware'.[26] And to create an interoperable program, it is often not practically possible to reproduce programs only 'to the extent reasonably necessary to obtain the information', as is required by the exception.[27] The Federal Court in *CA Inc v ISI Pty Ltd* called it a 'very limited exception'.[28]

17.31 The Internet Industry Association submitted that the exceptions for reverse engineering and interoperability in ss 47B and 47D are too narrow and 'seriously out of date':[29]

> The very limited nature of the rights to copy for the purpose of reverse engineering (s 47B and s 47D) is also an impediment to those wishing to study code in order to create new and/or interoperable systems. Note in particular that the relevant provisions do not permit reproduction for the purpose of testing interoperability.[30]

17.32 The Business Software Alliance, on the other hand, submitted that the existing exceptions should be retained: they provide certainty and clarity for users and rights holders, and they represent an appropriate balance.[31] The fact that Europe and the US have specific exceptions relating to software uses may also support this view.[32]

17.33 In light of some of the problems highlighted above—problems not discussed by those supporting the existing provisions—the existing computer programs exceptions may be in need of revision. Xavier suggested that one option would be to 'scrap the whole division and start again'.[33]

17.34 Another option would be to repeal the existing exceptions, and apply fair use or the new fair dealing exception, to determine whether these unlicensed uses of computer programs infringe copyright. The Internet Industry Association said it would be a 'futile exercise' to update the existing exceptions, and instead, favoured a principles-based approach.[34] Others submitted that the fair use exception may 'provide some leeway to Australian courts to consider the competition-enhancing benefits of reverse engineering and other acts covered by the computer program exceptions such as security testing and error correction'.[35]

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25 Ibid; R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.
26 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.
27 Ibid.
28 (2012) 201 FCR 23.
29 Internet Industry Association, *Submission 744*.
30 Internet Industry Association, *Submission 253*.
31 Business Software Alliance *Submission* 598.
32 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*. See also BSA, *Submission 598*.
33 R Xavier, *Submission 531*.
34 Internet Industry Association, *Submission 744*.
35 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

17.35 Some stakeholders submitted that an additional illustrative purpose could be added to the fair use provision, such as for 'interoperability, error correction and security testing'.[36]

17.36 In the ALRC's view, if fair use is enacted, further consideration should be given, and consultation with industry conducted, before repealing these exceptions. If the existing exceptions are retained, then the Act should be clear that they do not limit the application of fair use.

17.37 If fair use is enacted, it may also be necessary to introduce limitations on contracting out of fair use to the extent that it applies to particular uses of computer programs.[37]

36 R Xavier, *Submission 531*. See also Google, *Submission 600*; ADA and ALCC, *Submission 586*.
37 See Ch 20.