



30 November 2012

Australian Law Reform Commission
Level 40, MLC Tower
19 Martin Place
Sydney NSW 2000,
Australia

Re: Submission to the ALRC's Copyright and the Digital Economy Issues Paper

The BSA | The Software Alliance (BSA) appreciates the opportunity to submit comments on how Australia's copyright law is affecting participation in the digital economy. BSA is pleased to contribute to the Australian Law Reform Commission's (ALRC) inquiry into copyright and the digital economy, and in particular on the appropriateness and adequacy of current exceptions.

This submission provides details of our member organisations and an explanation of our members' reliance on copyright and how copyright law affects their creation, distribution and use of copyright materials. Specific responses to a range of the questions posed by the ALRC in the issues paper are addressed in appendix A.

About BSA

BSA | The Software Alliance (www.bsa.org) is the leading global advocate for the software industry. It is an association of world-class companies that invest billions of dollars annually to create software solutions that spark the economy and improve modern life. Through international government relations, intellectual property enforcement and educational activities, BSA expands the horizons of the digital world and builds trust and confidence in the new technologies driving it forward.

BSA's members include: Adobe, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, CNC/Mastercam, Intel, Intuit, McAfee, Microsoft, Minitab, Progress Software, PTC, Quest Software, Rosetta Stone, Siemens PLM, Sybase, Symantec, and The MathWorks.

BSA members develop and offer software and other creative content and services both offline and online, and develop many of the technologies and devices widely used for the delivery and enjoyment of content and services online, including 'cutting edge' technologies such as cloud computing. Our members are thus well positioned to understand both the vital importance of copyright and other forms of IP and the need for balanced, workable rules in the online environment.

Our members and virtually every other company in the software and technology sector rely heavily on copyright and other forms of IP to fund and promote on-going innovation which ultimately benefit consumers. From the largest enterprises to the smallest entrepreneurs, virtually every company in the software sector relies on copyright in various ways to help fund innovation, to maintain their development and distribution models, and/or to help secure the return on investment needed for further innovation. While our members rely on copyright, many also rely on liability limitations and other standard international norms and practices in the development of online services, such as online marketplaces and search engines. Copyright provides an important protection, permitting creators to be paid for their creative or innovative work and providing for returns on investment in research and development. Therefore it is important that any changes to the copyright laws do not reduce incentives to create copyrighted works and that any changes to the copyright laws to benefit new technologies consider carefully the significant impact they may have on the development of creative works.

Summary comments

Australia's Copyright system does not need a complete re-write

Australia's copyright system has proved to be flexible in supporting the wide variety of new innovations, works and services. While there is no need to rewrite the law, there are always opportunities to tweak and incrementally improve the law to accommodate new developments in technology and commercial paradigms. The existing Australian copyright and other intellectual property (IP) laws encourage and do not present barriers to innovation. These laws are largely fit for purpose, and support a vibrant market for technology, creativity, innovation and growth, among a wide spectrum of companies and industries.

In plainest terms, robust and effective IP protection is critical for creative industries. Copyright and the exclusive control over copyrighted works are the drivers of creative output and production. They allow creators, in Australia and around the world, to be rewarded for their endeavours, and also allow creators from around the world the opportunity to provide those creative works for the people of Australia. If IP protection is insufficient—whether from inadequate enforcement or overbroad exceptions—firms do not have much incentive to engage in investment of time and resources into creative activity for the benefit of consumers.

The foundations of copyright are built on promoting innovation and creativity. Balance is already an inherent feature of the copyright system in Australia. The essence of copyright is that it gives the creator of protected expression the right to control whether and how his or her material is used – vis-à-vis other commercial entities or indeed the rest of the world that may well want to use it without consent from or payment to the creator. There are solid economic and equitable reasons for this rule – it gives economic incentives and market-based rewards for such innovation and creativity, and provides a 'currency' or valuation mechanism for trading in such rights, and well as for the goods, services and licences based on such rights.

Balance is a fundamental part of this system, as is recognized already in the exceptions that are an important part of Australia's copyright laws. But these exceptions are—rightly—narrowly tailored so as not to invite or cause the reduction of incentives to create copyrighted works. The Australian copyright system is solidly built on, and should continue to adhere faithfully to, these fundamental principles.

BSA does not believe restructuring the framework of specific exceptions in Australia, for example to introduce a general-purpose 'fair use' or 'innovation' exception, is necessary. Any changes that would require or instigate a general re-writing of Australian copyright law would be harmful to creators, owners and distributors of copyright content, and would ultimately harm users.

The Issues Paper is framed to discuss concepts at a general level, and our members would appreciate the opportunity to provide feedback on specific options that may be generated in this review process.

Australia's International Framework obligations

It is important to note that Australia, as a member of the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO), has interests in the agreed international standards on the protection and exploitation of intellectual property rights. These entail well-established multilateral agreements in place concerning copyright and patent. Australia's IP system is part of an international intellectual property framework that is interdependent, largely governed by consistent rules and principles, and rightly championed for a long time by Australia as a vital policy support for innovation. It is important to keep in mind that the IP system works in Australia as it does globally, and that Australia has been able to enjoy the advantages in innovation and competitiveness that other countries that apply similarly robust IP protections enjoy.

Under the *Berne Convention* — and by reference, Australia's WTO obligations, including the Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the WIPO Copyright Treaty — each copyright exception must comply with what is known as the 'three-step-test':

- an exception to copyright must be a special case;
- the use must not conflict with a normal exploitation of the work; and
- it must not unreasonably prejudice the legitimate interests of the author.

This imposes on signatories to the treaties constraints on the possible limitations and exceptions to exclusive rights under national copyright laws. The three-step test has important implications on any signatory attempting to reduce the scope of copyright law, because unless the WTO decides that their modifications comply with the test, such states are likely to face trade sanctions.

Comments regarding specific questions posed in the issues paper

This submission is not intended to address all of the proposed questions for the inquiry in detail, however BSA does take this opportunity to respond to the following issues that are of significant importance to software developers and distributors.

Conclusion

BSA again thanks the ALRC for the opportunity to put this submission forward for consideration. We do not believe that the copyright regime in Australia is sufficiently broken to require a wholesale re-write and we believe it broadly works in the digital economy, however, we do support exploration of specific and targeted reforms to adequately respond to future challenges.

Yours faithfully,



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Appendix A – Specific responses to questions in the issues paper

The Inquiry

Question 1. The ALRC is interested in evidence of how Australia’s copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;
- (b) affects the introduction of new or innovative business models;
- (c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or
- (d) places Australia at a competitive disadvantage internationally.

Our members participate in economic activity throughout the digital economy, delivering online services, cloud computing services, search engines and digital copyrighted content, in addition to software delivered under traditional and newly-developing licensing models. Our members find that the Australian copyright system works relatively efficiently and effectively in the markets for our members’ products and services, providing consumers with robust, legal access to a wide-range of copyrighted works, while providing copyright holders with the incentive to keep innovating and providing new copyrighted works for the benefit of consumers. Innovations, products and services have been developed on the basis of, and in reliance on, Australia’s existing copyright and other IP laws. The copyright and IP system overall are working well in their role of providing the ‘intellectual currency’ to support innovation. Our members – like the rest of the ICT sector – have worked for many years under Australia’s copyright law, other IP laws and e-commerce and related legislation, and has found these reasonable and workable on relevant issues including adequate protections, licensing requirements and liability.

While there is significant evidence that Australia’s IP system works for both creators and consumers, there is little evidence that the copyright system in Australia is inhibiting innovation or stifling legitimate consumer access to copyrighted works.

Copyright and other IP protections are positively associated with innovation. IPR strength is a particularly significant determinant of economic growth, and of domestic innovation in developed countries.¹ The OECD has found that a 1% increase in the strength of copyright protection correlates to a 3.3% increase in domestic R&D in developing countries as well. IP protection helps firms that use IP succeed better than those that do not, and attracts investment in technology-related industries, both at the macro level (foreign direct investment) and micro level (venture capital). It is inadequate copyright and intellectual-property protection that undermines innovation.

The existing copyright laws in Australia, and its balanced and stable system of laws generally, are among the incentives that draw many technology companies to locate substantial operations in Australia. They also allow both new and existing content companies—from software creators to musicians—to offer Australian consumers the most recent and desirable content, technology, and experiences. Any substantial change in this regulation could have a potentially massive negative impact, upsetting settled business expectations, requiring widespread changes to contracts, and/or

¹ World Intellectual Property Organisation (WIPO), Economic Contribution of Copyright Industries, http://www.wipo.int/ip-development/en/creative_industry/pdf/eco_table.pdf. Tera Consultants, Building a Digital Economy: The Importance of Saving Jobs in the EU’s Creative Industries (Mar. 2010), http://www.teraconsultants.fr/assets/publications/PDF/2010-Mars- Etude_Piratage_TERA_full_report-En.pdf. Japan Copyright Institute, Copyright Research and Information Center (CRIC), Copyright White Paper – A view from the perspective of copyright industries, JCI Series No. 19, Vol. 3 (Aug. 2009), http://www.cric.or.jp/cric_e/cwp/cwp.pdf. ICC, Intellectual Property: Powerhouse for Innovation and Economic Growth (2011), [http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/IP_Powerhouse%20for%20Innovation%20and%20Economic%20Growth%20\(2\).pdf](http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/IP_Powerhouse%20for%20Innovation%20and%20Economic%20Growth%20(2).pdf).

otherwise changing the dynamic that presently attracts enthusiastic investments by innovative companies in Australia.

Guiding principles for reform

Question 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 ALRC has proposed 8 guiding principles for comment. These are represented in the table below, with the corresponding comment from BSA in the right hand column. In general terms, the BSA agrees with all eight guiding principles proposed by the ALRC. However, we emphasise that our understanding is that, using the Australian government’s principles for reform as described by the Office of Best Practice Regulation, copyright exists to correct a market failure and that the regime should correct it in a manner that maximises welfare (i.e. the consumer and producer surplus). It is not clear how these additional principles will help guide option development or the assessment of any reform options generated through this process.

In addition, though, BSA proposes that the ALRC consider another principle as part of the reform effort: Reform should not destabilize current existing legal structures on which copyright holders and their licensees rely as the basis for their business models and which are currently facilitating the access of Australian customers to creative works. In other words, any reform effort should preserve both the current incentives for the creation of copyrighted works and the broad, legitimate access to copyrighted works currently enjoyed in Australia.

ALRC’s Guiding Principles for Reform	BSA’s comment
<i>Principle 1. Promoting the digital economy - Reform should promote the development of the digital economy by providing incentives for innovation in technologies and access to content.</i>	Agree. However, this principle must be balanced against the other considerations. Other countries have shown that it is possible to encourage robust growth of digital businesses without imperilling copyright holders and consumers. Indeed, strong copyright laws are consistent with incentives to create and distribute a broad access to a wide range of legitimate content. As written, though, the principle places the growth of innovation and “access to content” above incentives to create works and the potentially significant negative impact that weakening IP rules could have on Australian companies and consumers.
<i>Principle 2. Encouraging innovation and competition - Reform should encourage innovation and competition and not disadvantage Australian content creators, service providers or users in Australian or international markets.</i>	Agree, subject to the same concerns expressed with respect to the first principle.
<i>Principle 3. Recognising rights holders and international obligations - Reform should recognise the interests of rights holders and</i>	Agree. An emphasis should be placed on the importance of legal stability for creators, suppliers and markets.

be consistent with Australia's international obligations.	
<i>Principle 4. Promoting fair access to and wide dissemination of content - Reform should promote fair access to and wide dissemination of information and content.</i>	Agree, subject to the same concerns expressed with respect to the first principle.
<i>Principle 5. Responding to technological change - Reform should ensure that copyright law responds to new technologies, platforms and services.</i>	Agree, subject to the same concerns expressed with respect to the first principle.
<i>Principle 6. Acknowledging new ways of using copyright material - Reform should take place in the context of the 'real world' range of consumer and user behaviour in the digital environment.</i>	Agree, subject to the same concerns expressed with respect to the first principle. BSA strongly advocates that current community practices should not, of themselves, determine the extent of copyright exceptions.
<i>Principle 7. Reducing the complexity of copyright law - Reform should promote clarity and certainty for creators, rights holders and users.</i>	Agree. The importance of reasonable certainty of legal rights and obligations to software copyright owners and other rights holders should be highlighted, in addition to users and distributors of copyright content.
<i>Principle 8. Promoting an adaptive, efficient and flexible framework - Reform should promote the development of a policy and regulatory framework that is adaptive and efficient and takes into account other regulatory regimes that impinge on copyright law.</i>	Agree.

Caching, indexing and other internet functions

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

BSA members, and the software industry generally, do not consider that current Australian copyright law impedes caching, indexing or other uses related to the functioning of the Internet. Though we do not see a pressing need for reform, because BSA members are active in these areas, we would be happy to participate in discussions of potential reforms.

Question 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?

BSA does not see a strong case for change in Australian copyright law, however we would be open to consider specific and appropriately targeted proposals for copyright infringement safe harbours for internet caching and indexing.

Cloud computing

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

BSA members deliver a wide variety of cloud computing services from Australia and to Australians, from consumers to enterprise customers, and do not consider Australian copyright law to be an impediment to those services and related business models.

BSA members, and the software industry generally, do not consider that current Australian copyright law impedes the development or delivery of cloud computing services.

Reform of data security and cross-border data flow standards, laws and arrangements are more important to the flourishing of cloud computing services in Australia than copyright reform.

As with caching and indexing, BSA members are engaged in the delivery of a range of cloud services, and would be happy to participate in discussions of potential reforms.

Question 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?

BSA does not see a strong case for change in Australian copyright law in this regard, however we would be open to consider specific and appropriately targeted proposals for copyright infringement safe harbours for cloud service providers associated with a notice and take down procedure for infringing content stored or delivered using the cloud service.

Copying for private use

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

No. There is a significant chance that a broad exception to permit private and domestic copying of copyrighted works would destabilize the current copyright system and increase piracy. Indeed, a private copying exception would likely create consumer confusion of what is legal and illegal copying, and make the detection and prosecution of infringement much more difficult. It is also not clear what benefits would flow from such exception, as consumers are being afforded more and more alternatives to sharing content across devices, services and with friends under the current regime.

For example, in regards to copying computer programs for private use, a wide variety of rights to copy legally acquired computer programs for private and domestic use is currently provided for in the applicable license agreements for the programs. The copying permitted is determined by a range of competitive market factors, and consideration of business model implemented by the rights holder for delivery of and any payment for use of the program. For computer program works, there should be no copyright exception to provide for private or domestic copying, because the contract terms provided by the rights holder already adequately provide for this matter.

Question 8. The format shifting exceptions in the *Copyright Act 1968* (Cth) allow users to make copies of certain copyright material, in a new (e.g., 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?

A general copyright exception to permit format shifting, or any format shifting exception that would apply to computer programs is strongly opposed. It is essential for computer programs to have consistent platforms selected by the rights holder for the work. Software rights holders provide for any format shifting of content by contract. Competitive forces determine the platforms on which a rights holder will release a version of the program and the rights to shift content granted to users.

Furthermore, any exception should not serve as the basis for undermining technical protection measures that manage licensed use of copyrighted material. We do not believe that, as an economic matter or as a technical matter, it is necessary or advisable to anticipate overriding technical protection measures that manage copies licensed only for limited or particular uses. Many copyright management technologies are such that a 'hack for one means a hack for all' – i.e. the investment in and effectiveness of such technologies can become worthless for managing new and innovative licensing models, if they are allowed to be circumvented for one purpose – particularly a purpose as potentially broad as private copying.

Question 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?

BSA opposes any expansion of Copyright Act Section 47C, which already permits the making of a back-up copy of a computer program subject to limitations. Any widening of back-up rights may facilitate a justification for piracy copying. This could have a significant negative effect on copyright holders and on the offering of copyrighted works to consumers in Australia.

Transformative Use

Question 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?

This use of copyright material does not generally apply to software works, except to the extent that open source software permits and governs the creation of derivative works thought its applicable license agreement. Moreover, because copyright law does not cover the ideas and functionalities of computer software, typically software creators can use ideas and concepts from existing software programs without fear of copyright liability so long as they do not copy code or other protected expression from the underlying work. In short, the current state of copyright law and licensing practice generally strike the right balance regarding remix of copyrighted software.

Question 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?

Question 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?

Question 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?

Any transformative use exception should apply only to 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.

As noted above, there is no need for any copyright exception for transformative use of computer programs. Current law and licensing practices, such as the various forms of open source licenses used in the software industry,² as well as proprietary licenses which include appropriate terms on , when activities like reverse engineering are permissible, have been effective in protection rights holders while not impeding legitimate innovation and competition in the industry.

Orphan Works

Question 23. How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

It is important to improve copyright information flow, including for orphan works. Determining who the rights owner is for purpose of rights clearance is a problem that a modern copyright system needs to address. The new reality is that transactions around copyrighted works online need to happen at a scale and speed that is much faster than the current systems of copyright information can handle. This problem is most pronounced in the case of orphan works, works as to which even after undertaking a diligent search for the copyright owner he cannot be found, and no conversation about a licence can even take place.

Question 24. Should the *Copyright Act 1968* (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

This could be dealt with in a carefully drafted reform to Australian copyright law remedies. For example, additional damages under Copyright Act Section 115(4) could made unavailable if the infringer was unable to identify and contact the rights holder after a diligent search.

More generally, the problem of 'information infrastructure' for copyright transactions online persists throughout many copyright sectors. We encourage each particular copyright industry to develop and integrate databases of copyright information to suit the particular types of works and business models.

Educational Institutions

Question 28. Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?

² Refer to http://en.wikipedia.org/wiki/Open_source_license ; <http://opensource.org/licenses/index.html>

Question 29. Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

Question 30. Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the *Copyright Act 1968* (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

Question 31. Should the exceptions in the *Copyright Act 1968* (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

Many of our members already provide special software licensing terms, including reduced prices, for educational institutions, teachers and students. Statutory licensing and free use exceptions should not apply to computer programs. Commercial licensing and distribution of computer programs is already widely available and accessible. The software industry already provides special pricing to educational institutions and this should continue to be a market-based commercial arrangement between vendors and educational institution customers.

Crown Use of copyright material

Question 32. Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

Question 33. How does the *Copyright Act 1968* (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

Question 34. Should there be an exception in the *Copyright Act 1968* (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?

Many of our members already provide special licensing terms, including volume-based price discounts, for all levels of Government in Australia. Statutory licensing and Crown use exceptions should not apply to computer programs, because there is no market failure of access and availability to address with respect to software. Commercial licensing and distribution of computer programs is already widely available and accessible. This should continue to be a market-based commercial arrangement between vendors and Government customers.

Statutory Licenses in the digital environment

Question 40. What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

Question 41. How can the *Copyright Act 1968* (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

Question 42. Should the *Copyright Act 1968* (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

Question 43. Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

Question 44. Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

Statutory licensing is neither necessary nor desirable for computer programs. Compulsory licences, in general, should be avoided. It is important that at heart, copyright licensing remains at the full discretion of the rights owner. Commercial licensing and distribution of computer programs is already widely available and accessible. The digital economy provides greater access to content and a choice of platform based on commercial, market-based models. Statutory licensing poses a significant threat to the interests of copyright owners and users, by raising costs for all and distorting trade.

Fair dealing exceptions

Question 45. The *Copyright Act 1968* (Cth) provides fair dealing exceptions for the purposes of:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news; and
- (e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

BSA does not consider that there are problems with the fair dealing exceptions in the digital environment, as they affect the software industry and software products and services.

Question 46. How could the fair dealing exceptions be usefully simplified?

BSA would be concerned with any uncertainty caused by simplification.

Question 47. Should the *Copyright Act 1968* (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

BSA does not see substantial need for changes to the fair dealing exceptions. They are clear, well understood and there is case law underpinning interpretation which provides for much needed certainty.

We see no need, justification or helpful purpose for diverging from international standards to create broad or vague new exceptions, such as for 'innovation'. It is the copyright rules in place and the market-led licensing and commercialisation of works based on these rules that are actually spurring innovation.

More generally with regards to fair dealing exceptions, 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 should be emphasized.

Fair use

Question 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?

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

A broad flexible fair use exception to copyright would create great uncertainty for the protection of intellectual property. BSA strongly opposes the adoption of a broad fair use interpretation on the basis that it would create uncertainty and there is no case law history – and so fails the test proposed by ALRC Principle 7. Fair use would require the courts rather than the Parliament to define the scope of copyright, and the Courts are not well equipped for legislating broad economic and policy issues of this type.

The underlying structure of Australian copyright law, which has long consisted of clear rights and specific exceptions in cases considered appropriate, does not need to be changed. Calls for such changes as a US-style fair use exception reflect an overly-simplistic and one-sided view of important copyright issues, and should be rejected. Instead, the Government should adopt a more thoughtful approach to preserving flexibility in the copyright system which recognises the following:

- BSA members operate several online services that rely on exceptions and flexibilities in national copyright laws, including common law doctrines like fair use in the United States, and believe strongly that appropriate flexibilities are critical to a well-functioning system. Contrary to the claims made to support adoption of US-style provisions, however, we have not found the Australian copyright system to lack necessary flexibilities for these services to operate.
- US-style fair use is a common law, court-based doctrine, not a legislative/statutory mechanism, that allows courts, in specific cases and under specific circumstances, to determine that certain activity is non-infringing. The common law approach in the Australian system has likewise developed doctrines that have been used to provide needed flexibility in technology-related copyright cases, such as implied licences. It has not been shown that the Australian common law system is incapable of addressing the needs of promoting innovation through case law development or that legislative amendments are needed.

The flexibility of a broad fair use exception has its costs that must be understood, namely that it is capable of being stretched too far to justify activity that is quite harmful to a robust copyright system. The Issues Paper is framed to discuss concepts at a very general level, and our members would appreciate the opportunity to provide comments and evidence regarding expected marginal changes that would result from specific options that may be generated in this review process.

It is also pertinent to note that the Australian Government in 2005 considered adoption of a fair-use provision and recommended against a fair use reform to Australian copyright law, highlighting some of the following difficulties:

- There are no clear-cut rules for distinguishing between infringement and a fair use.
- The only way to get a definitive answer on whether a particular use is a fair use is to have it resolved in a court, but outcomes in fair use disputes can be hard to predict.

- Applying the statutory principles can be difficult for the courts and fair use cases have been characterised by decisions in lower courts that have been overturned in courts of appeal and reversed again in the US Supreme Court.
- Defending a fair-use claim in court can be expensive and is mainly undertaken by corporations with considerable financial resources.

BSA agrees with those reasons, for which the Australian Government review recommended against fair use in Australia.

In sum, reducing the important issue of flexibility in copyright to one of simply 'porting' US fair use into the Australian system is a mistake. Instead, a more detailed and thoughtful inquiry into the necessary flexibilities in specifically identified areas, such as mechanisms to address 'orphan works' or consumer 'format shifting', should be undertaken. Fair use would be a 'sledge hammer to crack a nut' here – it doesn't ask or answer the relevant questions of what is needed to deal with priority issues that need addressing.

Contracting out

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

Licence agreements are widely used throughout the software industry, setting out the terms upon which rights holders provide users with the software.

Agreements that purport to exclude or limit existing or any proposed new copyright exceptions should be enforceable. Software developers need freedom to control the use of the software they create in order to develop innovative business models without the risk of such business models being undermined by copyright exceptions in particular markets.

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

The proposal to make copyright exceptions mandatory and to override all contractual provisions that deal with such issues in any different way is ill-advised. While certain exceptions in the software area and a very few other situations have been designed for specific reasons so as not to be overridden by contract, treating all exceptions this way would be inconsistent with longstanding Australian law and international practice.

In many copyright law systems worldwide, copyright exceptions are the designated default usage rules in the absence of contractual agreements allocating permitted usage differently. This makes sense, given that statutory rules are typically ill-suited for anticipating and supporting enabling the whole potential range of different business models, usage options, and financial arrangements that the market can and typically does come up with and that evolve over time.

Contractual usage terms for copyright material are the precise mechanism by which the options available to users can be made more varied, offered under different usage models, and made available at different price points. Rather than overriding such useful competitive market offerings with mandatory rules, it would be more appropriate to respect and uphold agreed licensing terms, and leave exceptions to work as a reasonable default when the usage terms and conditions have not been defined by contract. Copyright exceptions should not override the terms agreed between buyer and seller in the absence of clear and compelling evidence of market failure.

-ENDS -