494.\_org\_Play It Again", an international research team

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Submitted on behalf of: "Play It Again", an international research team, funded by the ARC, led by Assoc Prof Melanie Swalwell.

Proposal 4-1:

Proposal 4-2:

Proposal 4-3:

Proposal 4-4:

Question 4-1:

We propose that the following purpose be included:

Software preservation and archiving.

Our reasons are as follows: Internationally, the potential loss of nations’ ‘born digital’ heritage is an area of concern (see C. European Union, Council Resolution of 25 June 2002: on preserving tomorrow's memory - preserving digital content for future generations, Council Resolution 2002/C 162/02, (2002) and Preamble, Charter on the Preservation of the Digital Heritage, adopted at the 32nd session of the General Conference of UNESCO, 17 October 2003).  Currently, the legal impediments to archiving complex digital artefacts such as software are significant and are holding back Australia’s progress in digital preservation research.

Question 4-2:

**Proposal 4.2(b)** The fairness factors

First factor—‘the purpose and character of the use’. This factor encompasses

two issues. First, was the defendant’s use commercial? Secondly, was the use ‘transformative’?

We submit that the words ‘**or purpose’** be added to the first factor.

Our reasons are as follows: We note the fairness factors are expressed to be ‘non-exhaustive’ (4.151) and also that US jurisprudence would provide guidance (4.155). Nevertheless, a number of submitters express concern at the potential cost of litigation regarding the interpretation and application of these factors, particularly until Australia has built up its own substantial body of case law. With this concern in mind, we urge that the fairness factors in Australian law should more specifically acknowledge recent developments in US case law.  In particular, as Professor Jane Ginsberg has reported, the requirement to assess the purpose and character of the use when considering whether a use has been ‘fair’ has shifted from an examination of whether there has been a ‘transformative use’ to whether the use has a ‘transformative purpose’ (see J. Ginsberg, ‘Copyright 1992 -2012’, Colombia Law School Public Law and Legal Theory Paper no 13-329, p 124.) We therefore submit that the Australian concept of fair use should be explicitly rendered similarly expansive and that a requirement to show ‘transformative use or purpose’ should be enshrined in the proposed legislation. (For example we note that, in essence, archiving purposes are transformative as they move from commercial retail objectives to a not-for-profit cultural heritage objective.)

Proposal 6-1:

Question 6-1:

Proposal 7-1:

Proposal 7-2:

Proposal 7-3:

Proposal 7-4:

Proposal 8-1:

Proposal 8-2:

Proposal 8-3:

Proposal 9-1:

Proposal 9-2:

Proposal 9-3:

Proposal 9-4:

Proposal 9-5:

Proposal 10-1:

Proposal 10-2:

Proposal 10-3:

Proposal 11-1:

Proposal 11-2:

Proposal 11-3:

We submit that this amendment should not be limited to ‘libraries and archives’ but should be extended to other cultural heritage institutions and not-for-profit researchers.

Our reasons are as follows: It is not only archiving bodies which do this work.  The development of preservation solutions is often done in collaboration with researchers.  They may work in partnership with cultural institutions (research and development into digital preservation is seldom done in house), or researchers may work alone or in a university research centre, conducting research into new techniques in digital preservation for the public good.

Question 11-1:

It is not clear whether the concept of ‘mass digitization projects’ includes the born digital, i.e. that which does not need digitization but is already digital and needs preservation in its digital form?  Keeping complex born digital works (eg. software, games, media art works) accessible is a major technical challenge.  Cultural institutions need wide powers if they are to be able to take on this most important and urgent preservation of born digital cultural and other heritage materials.

Proposal 11-4:

We submit that the exception should also permit archiving bodies and researchers to circumvent any Technological Protection Measures.

In undertaking research into digital preservation, there is a need to be able to not only make copies, but change the format of the work, eg. decompile executables, translate code, and circumvent technological protection measures. The current provision (Copyright Act s 132APD) is inadequate for this purpose.

Proposal 11-5:

Proposal 11-6:

Proposal 11-7:

Whilst this is of concern to some copyright holders, the reality is that regarding for example, old software, after quite a short period of time (eg. 10-20 years) there is no commercial value, but there may be great cultural and heritage value in the work.  A commercial availability/disadvantage test is recommended here.

It is very difficult to provide access to born digital works whilst preventing the user from further communicating the work.  Our team is doing research on this at present, developing techniques whereby historic digital games can be viewed and interacted with in a browser, without distributing the code or ROM of the work.  Our approach is source code conversion, essentially writing translators from earlier computer languages to current generation ones.  This is an alternative to emulation, but research on emulation is much further advanced, with the European KEEP Project having implemented an Emulation Framework.[[i]](" \l "_edn1" \o ")  Given the investment in research into emulation to date, it is likely to provide the more efficacious solution for cultural institutions.  It is hard to see how emulated materials could be provided over a network whilst preventing users from copying the work.

[[i]](" \l "_ednref1" \o ") KEEP – Keeping Emulation Environments Portable, <http://www.keep-project.eu/>

Proposal 12-1:

Proposal 12-2:

Proposal 12-3:

We submit that the Orphan Works proposals may not be suitable unless orphan works are explicitly mentioned in the ‘illustrative purposes’ in the fair use provision itself.  In addition the requirement to make ‘a reasonably diligent search’ should be carefully tailored to the specific case of not for profit cultural heritage institutions.

In US case law fair use is not a guaranteed defence for defendants in disputes regarding the unauthorised use of orphan works (see for example Authors Guild, Inc. v. HathiTrust, 11 CV 6351 HB, 2012 WL 4808939 (S.D.N.Oct. 10, 2012). Jennifer Urban suggests that fair use could be a possible solution for archives and libraries seeking to archive orphan works but warns ‘Additionally, libraries and archives themselves have expressed concerns about the perceived uncertainty of relying on fair use in order to provide access to orphans’. (J M Urban, How Fair Use Can Solve the Orphan Works Problem’, (2012) 27 Berkeley Technology Law Journal, 1379, at 1384,  citing Prudence Adler, Brandon Butler, Patricia Aufderheide & Peter Jaszi ‘Fair Use Challenges in Academic and Research Libraries” 6, 13–15 (2010), available at <http://www.arl.org/bm~doc/arl_csm_fairusereport.pdf> ;  and Marc Parry, ‘Out of Fear, Colleges Lock Books and Images Away from Scholars’, Chronicle of Higher Ed. (May 29, 2011),  at <http://chronicle.com/article/Out-of-Fear-Institutions-Lock/127701/>.

 Urban notes (at 1395, n 61) ‘However, it is important to note that, without care, search costs could easily become unreasonably high, quashing the incentive or ability to make a socially beneficial use. Search costs could, in fact, quickly could become exceptionally burdensome, as a search for an unlocatable owner is, at a basic level, an attempt to prove a negative (that no one exists or that the identified owner cannot be found) that may be unprovable. Any solution to the orphan works problem, including fair use, cannot require searches so onerous as to undermine the benefits of the solution by making costs so high as to dampen incentives to use orphans or prohibit the possibility entirely. This is obviously especially important for nonprofit libraries and archives, which have limited budgets, forcing them to be cost sensitive.’

Proposal 13-1:

Proposal 13-2:

Proposal 13-3:

Proposal 14-1:

Proposal 14-2:

Proposal 14-3:

Proposal 15-1:

Proposal 15-2:

Question 15-1:

Proposal 15-3:

Question 15-2:

Proposal 16-1:

Question 16-1:

Proposal 16-2:

Question 16-2:

Question 16-3:

Proposal 17-1:

Additional comments?:

File 1:

File 2: