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Driving business success for consulting firms in the built and natural environment

29 July 2013

Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Ms Wynn,

Re: Consult Australia Submission – Copyright and the Digital Economy

Consult Australia is pleased to make this submission in response to the Australian Law Reform Commission's proposals and questions arising out of the discussion paper on *Copyright and the Digital Economy* (DP 79).

Consult Australia is the industry association representing the business interests of consulting firms operating in the built and natural environment. These services include design, engineering, architecture, technology, survey, legal and management solutions for individual consumers through to major companies in the private and public sector including local, state and federal governments.

We represent an industry comprising some 48,000 firms across Australia, ranging from sole practitioners through to some of Australia's top 500 firms with combined revenue exceeding \$27 billion a year.

The Built Environment and the Digital Economy

Copyright and intellectual property law are of vital importance to our industry, as they would be to other professional services sectors. Where our industry creates content and "know how", they rely on the protection of the law – to ensure they are rewarded for their innovation and authorship, whether it is a design, or a solution to a problem.

The establishment of the internet and rise of the digital economy has changed the nature of communications throughout society and across the economy, but chiefly has served to accelerate the spread of content and ideas, and to a wider audience. While this makes it easier to disseminate information, it also has created a range of challenges for authors to protect their copyright. The use of online tools to develop products collaboratively also presents its own distinct set of challenges.

As our economy is increasingly incorporated as part of a larger world economy, the growth and development of digital communication increasingly serves another purpose, in allowing Australian enterprises to do business with the wider world. In this context, there will be benefits for Australian businesses in coming under a copyright law system that better harmonises with those overseas jurisdictions where they conduct their work. Given the use of online content has a global nature in its dissemination, it follows that the law protecting authors should also have a global dimension.

Proposed Reforms – A General Response

In setting out Consult Australia's position in response to the proposed reforms, a small number of guiding principles must be touched upon.

The first of these is the reach of copyright law and the exemptions to it. Amongst consultants in the built environment sector, copyright and user licencing are generally allocated in the contract for the services. It is reasonably common for copyright to vest in the principal at the conclusion of the services being provided, with a possible alternative being that the end client receives a royalty free, irrevocable licence to use the intellectual property provided. A particular issue that arises under these arrangements is that third parties relying on a report prepared by a consultant, where they do not have a licence for the use of that material, could be in breach of the law.

Copyright is also frequently used in these same agreements as a tool to ensure the client pays the service provider. Under these arrangements, copyright or the licence is withheld until the fee owing is paid.

Accordingly, we are strongly of the view that the proposed reforms should not extend the exemptions beyond their existing reach, and should be designed to evolve in a way that does not allow gradual "creep". Any such changes represents a significant threat to our industry, and could have a range of effects including reduced innovation and an increase in fees for the use of services which in turn will flow on to end users.

The second principle of importance to us is the cost of legal action associated with copyright law. While we recognise that the proposed reforms may not impact on the volume and nature of legal action taken to protect intellectual property, we nevertheless feel it important that the burden of such action is acknowledged. We do not wish to see a situation arise whereby consultants are forced to litigate to defend their intellectual property from infringement at a greater rate than is currently experienced. Similarly, a situation whereby our members need to devote additional resources to defending claims they have infringed another's rights needs to be carefully considered so as to avoid vexatious claims.

Finally, contracting out of intellectual property rights is considered in the discussion paper. Consult Australia is of the view that contracting out of basic rights such as these should not be allowed, based on our experience with other aspects of contract law where rights and duties can be contracted out of.

The ability to contract out of fundamental legal rights is based on the premise that a contractual negotiation is a "level playing field", whereby the different parties come together to reach a considered compromise position. In reality, contracts for our (and other) industries are frequently offered on a "take it or leave it" basis, with little room for negotiation.

Lawyers acting for the principal will generally force the service provider to contract out of rights, and to take on a range of liabilities they would not otherwise have, in the name of shifting risk away from their client. Consultants are often unaware of the implications of these agreements, or alternatively are not in a position to refuse the work and are forced to sign up to work under those terms.

Should this experience translate to copyright law, there is the risk that parties may contract out of their legitimate rights, without being aware they are doing so, or where they are doing so under a form of economic duress.

BIM

One aspect of this discussion particularly relevant to our industry is the development and use of Building Information Modelling (BIM).

BIM is an integrated and shared digital representation of a building project or facility's key physical and functional characteristics. Developed by converting a two dimensional plan to a three dimensional model, with full information capture for the building, the use of BIM is highly collaborative as different contributors to the building's design each provide their input through a single online interface, using specialised software. The model of a building created by BIM is then used as a shared knowledge resource for information about that project across its life cycle, from planning and construction to demolition, and covering the maintenance and use of that facility.

One of the main benefits of BIM is realised through the ability of cross functional teams such as architects, engineers, builders, contractors and subcontractors to work on BIM enabled models for design and construction projects.

The growth and development of BIM around the world has led to an increasing uptake in its use, but also to growing industry angst about the ownership of copyright created collaboratively on this platform. In Australia, a working group comprising Consult Australia and other stakeholders has developed a guidance document to assist users understand their rights and responsibilities as they relate to intellectual property ownership of content in BIM. As a general principle, the document recommends that copyright be assigned in the terms of agreement for the project, and that individual contributors' copyright be protected in the same way as would be the case if the copyright were created in an offline collaborative way. The complete document can be accessed for your information at:
<http://www.bim.architecture.com.au/groups/legal.php>.

Having considered the discussion paper in the context of BIM, we do not believe the proposed reforms or a "Fair Use" exemption will change the way that copyright is created, used or protected. Nevertheless, Consult Australia considers it vital that the copyright created through BIM or other collaborative means remains protected from any exemptions to copyright law.

Making a Fair Use Exemption Work

After considering the discussion paper and in light of the principles expressed above, Consult Australia offers qualified support for the introduction of a generic "Fair Use" exemption to copyright law. The argument that the law needs to be able to adapt to rapid technological change is a strong one, although the importance of allowing certainty for corporate and individual consumers of intellectual property is also important.

To this end, we submit that any legislative change be accompanied by the development of non-binding guidance material made available to businesses and other stakeholders, to assist in raising their awareness of their rights and the limitations to their use of copyright material. This guidance could draw on US jurisprudence as proposed, although must recognise the different legal context between the US and Australia. Similarly, that guidance must also adapt to the creation of precedence in Australian courts over time.

Conclusion

Consult Australia notes the challenges faced to ensure Australian copyright law keeps pace with technological change, and other legal jurisdictions that will often be in competition with

Australian industry. For the reasons outlined in this submission, we believe a principle based "Fair Use" exemption is a positive development, provided adequate assistance is provided to interested stakeholders to ensure they have they requisite level of certainty for their operations to not be adversely affected through the transition period. Should you wish to further discuss this submission, please contact our Senior Legal Policy Advisor, Robin Schuck, on (02) 9922 4711 or by email at robin@consultaustralia.com.au.

Thank you once again for the opportunity to comment on these proposals.

Yours sincerely,



Megan Motto
Chief Executive Officer