640.\_org\_ Cyberspace Law and Policy Community

Full name:

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Submission on behalf of: Cyberspace Law and Policy Community

Proposal 4-1:

We support the ALRC’s proposal for a general fair use exception to copyright for the reasons extensively explored in the Discussion Paper.

This proposal is also consistent with both broad public expectations, and with the previously stated goal of increasing the compatibility between Australian and US copyright models, as partially implemented after the A-US Free Trade Agreement in 2005 and the amendments in 2006.

Fair Use appears to be compatible with a thriving and successful copyright industry in the US, and there seems no reason to assume it will be any different in Australia. Contrary to concerns raised about such changes undermining respect for or compliance with copyright law, our earlier work, mentioned below, suggests that both respect for and intended compliance with copyright provisions is likely to be improved, to some extent, by moves to align them with perceptions of a ‘fair’ and balanced regime.

Proposal 4-2:

Proposal 4-3:

Proposal 4-4:

Question 4-1:

While we do not have any additional suggestions for illustrative purposes at this point (although a case could be made for adding Orphan Works), it may be worth considering introducing a mechanism for adding illustrative purposes as required.

Even though the list is relatively technology neutral, that does not mean that future technological development might not generate new uses for content that are not currently anticipated. Just as the illustrative purpose of “non-consumptive use” arose out of relatively recent technological developments, future technological developments may raise questions about new kinds of uses.

Thus in line with the general statement in the Discussion Paper at [3.3], the ALRC should consider enabling regulations under which additional illustrative purposes can be added. This possibility was seemingly rejected at [4.170]. As the ALRC noted, there are strong reasons to keep the Act itself technology-neutral.

However, additional illustrative purposes may be appropriate where uncertainty arises in relation to a particular new use. Not only would regulations be able to add new general categories of illustrative purposes, but, being more easily amended than legislation, could also incorporate technology-specific illustrative purposes where that was felt desirable. Such regulations would be additional to sector-specific and organisation-specific guidelines (referred to in [3.85]) and could provide greater legal certainty in contexts that cannot yet be foreseen.

Question 4-2:

The exceptions which ALRC suggests should be repealed if fair use is enacted are appropriate, considering the proposal overall.

Proposal 6-1:

Question 6-1:

If the statutory licences were repealed, we agree with the proposal that the Copyright Act should also be amended to provide for certain residual free use exceptions for governments and educational institutions that would only operate where the use cannot be licensed. We don’t have specific suggestions for the scope of these exceptions.

Proposal 7-1:

Proposal 7-2:

Proposal 7-3:

Proposal 7-4:

Proposal 8-1:

We agree with the ALRC’s suggestion of a general fair use exception applying to data and text mining (DTM).

In particular, we believe this will work better than either a more specific DTM exception or a licensing scheme.

As the ALRC notes, one advance of the fair use approach is that it is relatively technology-neutral –  this is particularly important here given the continuing evolution of the DTM technologies. In particular, there is no reason to assume that DTM will always “copy” works, so that what is “fair use” may fluctuate according to a changing technological context.

Fair use is also preferable to a licensing scheme. Submissions to the Issues Paper reveal the strongest arguments for a licensing scheme are: (1) that DTM is a novel technology and thus there is no current need for legislative intervention (John Wiley & Sons, Submission 239, at 7; ALSP, Submission 199 at [71]); and (2) that the significant costs associated with facilitating effective DTM processes require licensing arrangements to ensure that content owners are not financially disadvantaged (John Wiley & Sons, Submission 239, at 7).

These arguments are not particularly persuasive. First, that a technology is new is no bar to legislative reform. This is particularly so where the proposed legislative intervention is relatively technology-neutral. In this case, it is probable that the ALRC proposal would be beneficial, as it would overcome much of the legal uncertainty that researchers face regarding permissible and non-permissible mining of copyright works. Additionally, statutory reform may bring uniformity to this area. Currently the mining of content owned by publishers is governed by licensing agreements, which differ between publishing groups (See for example research by UCSC’s Genocoding Project regarding permissions granted by major science publishers for DTM: <<http://text.soe.ucsc.edu/progress.html>> at 26 June 2013).

Legislative reform may overcome these variables, which would in turn facilitate further uses of these technologies. Secondly, although it is likely that content owners will, and do, incur costs in facilitating DTM (Hargraves Review, 1st Report, Volume 1 at [56]), any financial detriment incurred in doing so is not a copyright issue: it does not speak to the aims of copyright. Rather, it is a business model issue, and, as stated at [2.25] “it is essential to recognise that ‘the digital economy is not measured purely by financial indicators, but also that cultural benefits play a significant part in the digital economy’.” Furthermore, the emerging importance of DTM in research and business indicates that content owners will incur these costs regardless of whether fair use is enacted in order to remain competitive.

Although the ALRC’s proposed fair use exception is appropriate, refinements can nevertheless be made.

First, the ALRC can provide more guidance on the ‘fairness factors’ that may be considered when determining whether DTM has infringed copyright ([8.79]). At 8.79, the ALRC proposes that voluntary licensing should be pursued for commercial uses of data and text mining. Commerciality is presumably linked to the “purpose and character of the use”, since commerciality is not itself a fairness factor. Using commerciality as the reference point is in any event problematic in this context. As raised by John Wiley & Sons (Submission 239, at 7), and the CSIRO (Submission 242), distinguishing between ‘commercial’ and ‘non-commercial’ use is problematic. This is particularly so in the DTM context, where information may be gathered for more than a single purpose and may be used in commercial and non-commercial ways. Data mining may be done in relation to commercial medical research, for instance – it is not clear that the commerciality ought always be decisive. Indeed, the generally worded fairness factors will enable a range of circumstances to be taken into account, but perhaps not yielding the result foreshadowed in 8.79. In light of that, the comment in [8.79] may be misleading.

Additionally, the definition of ‘non-consumptive’ use may need careful drafting. The use of the phrase “trades on the underlying… expressive purpose of the work” is problematic and confusing. Firstly, this is because it is unclear what “expressive purpose” entails. While it is clear that mining for the occurrence of, for example, the occurrence of the name ‘Jim’ in nineteenth century novels (C Haven, Non-consumptive research? Text-Mining? Welcome to the Hotspot of Humanities Research at Stanford (2012) <[http://news.stanford.edu/news/2010/ december/jockers-digitize-texts-120110.html](http://news.stanford.edu/news/2010/%20december/jockers-digitize-texts-120110.html)> at 26 June 2013) would not be concerned with an “expressive purpose”, mining for the use of particular metaphors, and the context in which they arise, may. It is thus important for the ALRC to be careful in how the term “non-consumptive use” is defined.

Proposal 8-2:

Proposal 8-3:

Proposal 9-1:

We agree with the proposed treatment of Private and Domestic Use.

The existing patchwork of fair dealing exceptions is unworkable in terms of educating consumers for compliance, and a fair use model is likely to encourage greater respect for and compliance with its requirements in the private and domestic setting.

Our earlier work for Consumers International suggests that this would be the case, as it showed a small but significant improvement in stated respect for and intention to comply with the Act when it was brought into more into line with expectations of a fair balance in 2006 in relation to format shifting. (D. Vaile 'Shifting Sands? The moderate impact of Australia’s 2006 copyright exceptions,' chapter 3 in Malcolm, J. A2K for Consumers: Reports of Campaigns and Reports 2008-2010, Consumers International, Kuala Lumpur, Malaysia, September 2010, at: <http://a2knetwork.org/sites/default/files/a2k-reports2010.pdf>)

This should to some extent alleviate concerns that moves towards a fair use model would somehow ‘open the floodgates’ and encourage disrespect and non-compliance.

A problem revealed in that earlier survey was that awareness of the complexities of the 2006 amendments was low; a fair use model is likely to also address this to some extent, if the illustrations are clear and straightforward examples of the operation of the principle.

Proposal 9-2:

Proposal 9-3:

Proposal 9-4:

Proposal 9-5:

Proposal 10-1:

Proposal 10-2:

Proposal 10-3:

Proposal 11-1:

We support the repeal of s200AB and related changes for Libraries, Archives and Digitisation.

s200AB has always been in unsuitable form for practical application, and its operation has been shrouded in uncertainty. Drafting principles in international treaties cannot be translated baldly into statutory provisions.

Proposal 11-2:

Proposal 11-3:

Question 11-1:

Proposal 11-4:

Proposal 11-5:

Proposal 11-6:

Proposal 11-7:

Proposal 12-1:

We agree with the proposed treatment of Orphan Works.

Orphan works remain a very substantial problem, inhibiting legal uses of older and lesser known Australian works.

Proposals for a complex multi-stage registration system leading up to eventual registration as an Orphan, while addressing some of the concerns about possible abuse of an Orphan Works provision, are ultimately not suitable to the scale of the task (in the EU and UK, there is evidence that there are massive numbers of potentially usable orphan works, and we expect the same to apply here), nor to the business realities of Orphan Works (use of which would be non-remunerable, and hence should not be front loaded with registration and administration fees).

Experience of the Canadian scheme demonstrates the unviability of this sort of registration scheme: after many years of operation, only a handful of works have been actually processed. (De Beer, Jeremy, and Bouchard Mario. ‘Canada’s “Orphan Works” Regime: Unlocatable Copyright Owners and the Copyright Board’ (1 December 2009). Copyright Board and Department of Canadian Heritage, at: <http://www.cb-cda.gc.ca/about-apropos/2010-11-19-newstudy.pdf>).

See also response to proposal 12-2.

Proposal 12-2:

A key concern for any solution is of course to discourage misuse of false assertions that a work is an orphan when it is not, to avoid its rightful owner (should they exist and be locatable) being deprived of remuneration. This is particularly important for photographers, whose opposition has stymied proposals in UK and US. Proposals 12-2 and 12-3 represent a reasonable approach to the central question of whether the search for such owner was diligent or not, and will support the adoption of commercially realistic assessments of the potential for using Orphan Works by limiting the risk of unpredictable punitive or exemplary damages if an owner subsequently appears.

The potential for abuse is limited by the focus on this diligence, and hard to find creators may be more likely to end up with remunerated uses under this model than under the current unsatisfactory situation of unpredictable levels of risk, since Orphans will generally be more used, and the occasional rediscovered creator will remain entitled to normal remuneration levels.

The ALRC proposal is largely consistent with the approach which was discussed at a workshop on the topic at UNSW in February 2011, as set out in a paper circulated later (D. Vaile, ‘Orphan Works – Issues and Solutions? Working Paper’, version 12, September 2011, at: <http://cyberlawcentre.org/> orphan/Issues\_and\_solutions\_v12.pdf).

Note that both industry practices and improved online database integration for search purposes would be necessary to make a scheme work, and these appear to be supported by the proposed text.

In addition, online risk assessment tools (for proposed institutional and other users) of the type pioneered by the British Library would help streamline the process for large volumes or low value projects. It appears this may be recognised in the proposed text, but if not, consideration should be given to whether explicit recognition of the reasonableness of using an established and accepted risk assessment model in simplified form through an online interface should be supported. (Open Educational Resources IPR Support. Risk Management Calculator, interactive online risk assessment tool for works including orphan works (January 2011), at: <http://www.web2rights.com/> OERIPRSupport/risk-management-calculator/; see also media release, at: <http://www.jisc.ac.uk/news/stories/2011/01/calculator.aspx>).

Proposal 12-3:

See response to Proposal 12-2.

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:

We support the prevention on contracting out of the benefit of exceptions.

Additional comments?:

File 1:

File 2: