

Your Ref: Copyright and the Digital Economy Issues Paper

Quote in reply: 332 – 1 - TIPS

31 July 2013

The Executive Director
Copyright and the Digital Economy Issues Paper
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

By Email: info@alrc.gov.au

Dear Executive Director

COPYRIGHT AND THE DIGITAL ECONOMY (IP 79)

Thank you for the opportunity to make submissions in relation to the Australian Law Reform Commission's (ALRC) Discussion Paper: Copyright and the Digital Economy (the Paper).

This submission is made with the assistance of the Queensland Law Society's Technology and Intellectual Property Committee. The Society notes that the Paper is predominantly directed at the introduction of a "fair use exception" to the use of copyright material and a consequential removal of the various current categories of fair dealing exceptions.

Unfortunately in the time available to the Society and due to the commitments of our committee members, the Society has not been able to debate in detail the complex issues surrounding the introduction of such a "fair use exception". The Society acknowledges the legitimate desire to extend defences available to some classes of copyright users in order to encourage innovation and productivity in a rapidly changing technological environment. The ALRC is, however, reminded that the "fair use model is not a panacea for solving difficult problems resulting from digitisation and the internet".¹

In the event that a "fair use exception" is incorporated into the *Copyright Act 1968* (Cth) then the list of factors and purposes to be considered in determining fair use, "the fairness factors" and the "illustrative purposes", should be carefully drafted to provide clarity and avoid confusion for members of the public seeking to rely on such defence.

It is not suggested that this submission represents an exhaustive review of all issues contained in the Paper. It is therefore possible that there are issues relating to unintended consequences which we have not identified.

¹ (Barry Sookman and Dan Glover - Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright (2009) 2 Osgoode Hall Rev. L. Pol'y 139 at 141)

There are 4 specific areas on which the Society provides feedback:

- Chapter 8: non-consumptive use;
- Chapter 10: transformative use and quotation;
- Chapter 12: orphan works; and
- Chapter 14: government use.

1. Chapter 8 – non-consumptive use

This chapter deals with caching and indexing by search engines and text and data mining.

The Society submits that ALRC's proposal to make a fair use exception of what is commonly referred to as caching and indexing, and data mining is sound. The Society submits this is so as neither the purpose nor the outcome of these activities is generally the reproduction, adaptation or communication of the relevant copyright work for its own sake.

The Society respectfully submits that ALRC's suggested definition of 'non-consumptive use' is ambiguous and could lead to unnecessary litigation. The ALRC's proposed definition is:

"a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.

The definition would require the defendant to establish a negative. This is difficult. Also the definition would, amongst other things, involve a consideration of:

- (a) whether the use trades on something; and
- (b) whether that something is the underlying creative and expressive purpose of the material.

As to (a) the Society submits that the focus should be on whether the purpose of the user of the material is to directly exploit the relevant copyright. Further the Society submits that it is not clear why the definition should be limited to commercial activity (i.e. through the reference to trade) as opposed to non-trading activity.

As to (b), given that copyright focuses on expression rather than creative or expressive purpose, the Society queries why ALRC's formulation does not refer instead, just to 'directly trade on the expression of the material.'

The Society submits, for ALRC's consideration, the following fall-back alternative:

the doing of an act comprised in the copyright of the [work or other subject matter] which is a reasonable or necessary incident of another act by [the defendant] whose sole and demonstrable purpose, and the effect of which, is other than to take direct advantage of the copyright.

2. Chapter 10 - transformative use and quotation

This chapter deals with transformative use.

The Society agrees with ALRC that the concept of 'transformation' in the Australian copyright law context and vernacular would be fraught with ambiguity and should not be at the heart of a fair dealing defence.

ALRC has raised whether, for the purpose of a special 'fair dealing for quotation' defence, some illustration might be appropriate.

The Oxford English Dictionary (current online edition) defines the noun 'quotation' as 'a group of words taken from a text or speech and repeated by someone other than the original author or speaker.' This is a very wide concept and also does not cover musical or artistic works. This definition involves no purposive, qualitative or quantitative limitation. The Society submits that if "quotation" is not given some illustrative or purposive context, an exception based on it might evolve to be broader than may be intended. The Society submits that any defence on this aspect should be framed by reference to a quantitatively and qualitatively reasonable act which is for the purpose of acknowledging the original or some circumstance or person connected with the original.

3. Chapter 12- orphan works

The Society supports the ALRC proposed reforms for orphan works which are intended to:

- increase the quantities and types of orphan works available for use;
- ensure that rights holders are adequately compensated;
- promote efficiency and reduce unnecessary burdens on users and public and cultural institutions;
- be cost effective; and
- be compliant with Australia's international obligations.

It considers that the reforms should not be restricted to uses by natural persons and should extend to commercial and non-commercial uses.

Orphan works are described as copyright material where an owner cannot be identified or located by someone wishing to obtain rights to use the work.² The Society considers that it is fundamental to the reforms that orphan works be properly determined as works that have an unidentified owner or one that is unable to be located which, in turn, hinges upon the extent of the "reasonably diligent search" for the copyright owner.

Reasonably Diligent Search

It is the view of the Society that care needs to be taken to ensure that only works that have an unidentified owner or one that is unable to be located are classified as orphan works. Accordingly, the Society agrees that the nature of the search should not be prescribed, but that in keeping with the ALRC proposal for a 'fair use' exception, amendments should be made to the *Copyright Act 1965* to specify factors that should be considered in determining the nature of a "reasonably diligent search". It is suggested that the factors make clear that a search for the owner of a work does not result in an orphan work merely because an identifiable and contactable owner refuses or ignores requests to use a work. The Society considers that there is some force in the argument that the extent of the search required

² Australian Law Reform Commission, *Copyright and the Digital Economy*, paragraph 12.5.

"should be greater where the work is recent, or created for professional purposes or proposed to be used in ways that are hard to revoke".³

Further, to promote efficiency and cost minimisation, the Society agrees with the ALRC's view that there should be no restrictions imposed upon users requiring that specified organisations are engaged to conduct the searches. However, the conduct of a search through an appropriate collection agency or search organisation might be considered as one of a number of actions which might be taken into account in determining whether a diligent search has been conducted.

Absent a reasonably diligent search, the Society considers that a possible orphan work should not be used unless a copyright exception is applicable. The Society notes the ALRC's comment that where a search is not feasible, a user will need to rely upon the fair use exception. Significantly, where the fair use exception is not available, the Society considers that a voluntary extended licensing scheme as referred to in paragraph 12.76 is not appropriate. Unless a work is likely to be determined to be an orphan work as a result of a reasonably diligent search for the owner of the work, the owner should not be at risk of the work being licensed without the owner's permission.

The Society considers that the time frame for determining whether a work is an orphan work is significant and should be such as would allow an owner a reasonable opportunity to claim a work. The timeframes proposed by Brennan and Fraser⁴ appear adequate. However, as stated below, the Society does not support the implementation of a centralised licensing scheme.

Additionally, the Society considers that a publicly accessible online register of orphan works is crucial for copyright owners to identify works claimed to be orphan works and for users of orphan works to make use of information elicited by prior searches for the owner of a work. However, it should be made clear that reliance upon the prior search or repetition of the search may not be sufficient to amount to a reasonably diligent search.

Licensing

The Society respectfully adopts the view of the ALRC that a licence should not be required in all circumstances before use of an orphan work and commends the view expressed by CSIRO⁵ that disbursement of a licence fee to members of a collecting society in the absence of the owner of the copyright work would be unfair.

Upon completion of a reasonably diligent search and expiry of reasonable timeframes for a copyright owner to claim a work that has been recorded on a register of orphan works, no system of licensing (such as that adopted in Canada or proposed for the UK) should be required before use may be made of the orphan work. For this to occur it is necessary that the determination of a work as an orphan work should result in statutory limitations being imposed upon the remedies available to the owner of the orphan work.

³ J. Given Submission 185 referred to in Australian Law Reform Commission, *Copyright and the Digital Economy*, paragraph 12.68

⁴ D Brennan and M Fraser, *The Use of Subject Matter and Missing Owners – Australian Copyright Policy Options* (2012), 9-12.

⁵ Australian Law Reform Commission, *Copyright and the Digital Economy*, paragraph 12.53

Limitation on Remedies

If the ALRC's stated objective of increasing the quantities and types of orphaned works available for use is to be achieved, the remedies otherwise available to the owner of the orphan work will need to be restricted so to minimise the risk otherwise associated with use of the work. Failing that, a user should prefer the certainty of a licence from an identified and contactable owner of a work.

Accordingly, the Society supports the amendment of section 115(3) of the *Copyright Act* to provide that, in an action for infringement, where it is established that a user has conducted a reasonably diligent search and the owner could not be found prior to the infringing use, the plaintiff is not entitled to any damages, but may be entitled to an account of profits or injunctive relief. However, no injunctive relief should be available as would unreasonably restrict use of the work or a use of the work that has commenced to be implemented by the user prior to the receipt of any notice of ownership of the work. In particular, derivative works including a work that wholly reproduces an orphan work such as a photograph included in a cinematograph film should not be subject to any injunctive relief.

Finally, the Society raises for consideration the possibility that the reasonably diligent search will need to at least determine the existence of some nexus between the orphan work and Australia such as will warrant the application of Australian copyright law.

4. Chapter 14 - Government Use

The Society now turns to the ALRC's proposal of applying the proposed fair use exception to government use of works and, specifically, applying the proposed fair use exception when determining whether a government infringes copyright.

The Society submits that it will never be possible to dissuade people from the view that governments have "deep pockets". Consequently, we anticipate that, if the fair use exception is adopted, governments (including the frequently poorly resourced local governments) and statutory bodies will inevitably find themselves overrepresented in copyright infringement proceedings and not always successful in invoking the fair use exception as a defence (even when previous decisions indicate they should be successful).

Clear precedent will take years to evolve - indeed, there are commentators who would argue that United States litigation has shown time and again that there is no such thing as clarity in fair use litigation. It would appear obvious that, during this time of evolution and after experiencing expensive and protracted copyright infringement litigation, governments and statutory bodies are likely to exercise extreme caution when dealing with works of any kind, regardless of whether the purpose of that dealing is public administration or something other. This would appear to be diametrically opposed to the concept of "open government". This type of caution regarding copyright would also appear to hinder innovation - which flies in the face of one of the perceived great benefits of adopting a fair use exception - that it will assist innovation.

The Society suggests that, rather than adopting a fair use exception and applying it to government use of copyright, the existing statutory licences be maintained and, in some instances, their ambit extended.

The existence of statutory licences provides clear parameters and processes within which governments can work. Statutory licences, by being prescriptive in nature, remove uncertainty and enable governments to attend to the issues of public administration, knowing that there are specific collecting agencies that must be paid fees for use of certain documents (such as surveyors' plans). The Society would like to take this opportunity to acknowledge that the mere fact that a statutory licence is in place does not mean that funds are payable by the government in question to the collecting agency. The Society acknowledges that many statutory licences are "zero rated" and, so, do not result in funds being paid by the government in question to the collecting agency.

Freedom of Information

In the discussion paper, the ALRC has directed its attention to the federal and the states' Freedom of Information legislation, and basically suggests that the existence of Freedom of Information legislation - designed to "promote democracy"⁶ - could be better effected if a fair use exception was adopted.

The ALRC clearly illustrates in its paper that the only level of government that may act in accordance with the *Freedom of Information Act 1982* without any concern regarding copyright infringement is the Federal government, that state and territory governments may fall within the ambit of existing statutory licences but local governments do not fall under statutory licence and have no immunity.

The Society submits that the easiest way to resolve this issue is to extend statutory licences to local government, in the manner suggested in the Screenrights and CAL/Viscopy submissions. If s182B of the *Copyright Act* is amended so that local government is deemed to be government, all tiers of government could rely on s183 of the *Copyright Act* equally, thereby removing the possibility that local government infringes copyright whenever it complies with a Freedom of Information request.

Material Open to Public Inspection

The ALRC's discussion paper also indicates that the existence of this material - which may have been deposited with a tier of government for one reason but is now being used by that tier of government for ancillary purposes (as was the case in *Copyright Agency Ltd v. The State of New South Wales* (2008) 233 CLR 279) - could be best dealt with if a fair use exception was introduced.

The fact that there is documentation in a government's possession that has developed a "second life" does not place the government that holds the documentation or the copyright owner in a no-man's land of uncertainty - thereby justifying the adoption of a fair use exception. In fact, the case is just the opposite. It was held in *Copyright Agency Ltd v. The State of New South Wales* (2008) 233 CLR 279 that statutory licences are applicable where documents are being used by the government - regardless of whether that use was for the primary purpose or the ancillary purpose.

Consequently, the Society supports Copyright Agency / Viscopy's comments:

⁶ ALRC Discussion Paper: Copyright and the Digital Economy at page 289

"All uses of copyright material by governments for government purposes can be done in reliance on the government statutory licence. The extent to which certain uses done in reliance on the statutory licence are taken into account for the negotiation of fair payment can vary according to emerging technology and other developments. This approach thus provides consistency, simplicity and equity."⁷

Government use of Government Material

The Society notes the arguments made in favour of a fair use exception and how it would facilitate the use of the copyright of one arm of government by another arm of government, without the need for funds to be transferred from one arm of government to another. We suggest that the same effect could be achieved by having a zero charged statutory licence.

Introduction of Fair Dealing

The Society notes the ALRC's second proposal which reads:

"If fair use is not enacted, the Copyright Act should provide for a new exception for fair dealing for public administration. This should also require the fairness factors to be considered."⁸

The unfortunate reality is that, due to the need to include consideration of the fairness factors, any introduction of a fair dealing exception would bring with it the same uncertainty of a fair use exception. It would be for the courts to decide what was fair and precedent would take years to evolve - hindering innovation and leaving all tiers of government operating in a state of extreme caution.

The Society cannot support the introduction of a fair dealing exception in place of the fair use exception, simply because they both have the potential to cause exactly the same problems as those which would be caused by the introduction of the fair use exception.

Use for Judicial Proceedings and for Members of Parliament

The Society notes the ALRC's third government use related proposal:

"The following exceptions in the Copyright Act should be repealed:

- (a) ss43 (1), 104 - judicial proceedings; and*
- (b) ss48A, 104A - copying for members of Parliament"⁹*

It would seem clear that judicial and parliamentary services play an important role in government. Consequently, it would appear to be logical to remove these exceptions from the *Copyright Act 1965* if the fair use exception was to be introduced. However, at this stage, there is no certainty that the fair use exception will be introduced and, consequently, it appears that discussion regarding the removal of these existing exceptions appears to be somewhat premature.

⁷ Copyright Agency / Viscopy - Submission to Australian Law Reform Commission Inquiry into Copyright and the Digital Economy - November 2012 at page 56

⁸ ALRC Discussion Paper: Copyright and the Digital Economy at page 12, proposal 7-4

⁹ ALRC Discussion Paper: Copyright and the Digital Economy at page 16, proposal 14-3

In the Society's view, there would appear to be no good reason to adopt any concept which would breach Australia's international obligations. This is especially the case if the adoption of the concept in question has previously been considered and recommended against. To reconsider a proposal to adopt such a concept would indicate that new qualities have been discovered that now make the concept a viable option.

The unfortunate truth is that a fair use exception is no more of a viable option than it was when it was last considered. Adopting such an exception would still result in Australia breaching its obligations under the Berne Convention and TRIPS and it would not facilitate the realisation of a model of open, efficient and transparent government. Rather, adopting a fair use exception has the potential to stifle innovation and bring government's dealing with all matters concerning copyright to a grinding halt. This is far from a desirable outcome and one best not pursued by the Australian government.

Please do not hesitate to contact our policy solicitor, Ms Louise Pennisi, on (07) 3842 5872 or via email on l.pennisi@qls.com.au, should you have any queries regarding this letter.

Yours faithfully



Annette Bradfield
President