

ALRC *Copyright and the Digital Economy Update*

Background

Issues paper released

On 20 August 2012, the ALRC released its first issues paper for its Inquiry into Copyright and the Digital Economy in Australia. The purpose of the Inquiry is to determine whether exceptions and statutory licences in the Act are adequate and appropriate in the digital environment and whether further exceptions should be recommended. In conducting the Inquiry the ALRC must have regard to:

- the need to ensure copyright law provides incentives for creation and investment in innovation;
- the general interest to use and interact with content for the advancement of education, research and culture;
- opportunities for innovation leading to national and economic cultural development;
- international obligations;
- international developments; and
- previous copyright reviews.

Submissions on the paper are due on **16 November 2012**, with a final report due by 30 November 2013.

What matters are being considered?

The ALRC asks whether further statutory exceptions should be made to the current legislative framework to: recognise "fair use" of copyright material; allow transformative, innovative and collaborative use of copyright to deliver new products and services of public benefit; and/or to allow access, use, interaction and production of copyright material for social, private or domestic purposes.

The Inquiry must also take into account the impact of proposed reforms in other areas of law; consistency with Australia's international obligations (such as the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights or the Berne Convention); and any recommendations from other reviews, particularly the Convergence Review.

What matters are excluded?

The Inquiry will not look at issues associated with the possible extension "carriage service providers"; any extension of the legal deposit scheme in section 201 of the Act, any exceptions for persons with print disabilities; or international treaty discussions on technological protection measures.

What are the guiding principles of the Inquiry?

The ALRC has developed several guiding principles to inform its approach in its Inquiry and any ensuing reforms. They include:

1. Promoting the development of the digital economy by providing incentives for innovation in technologies and access to content;
2. Encouraging innovation and competition and not disadvantaging Australian content creators, service providers or users;
3. Recognising the interests of rights holders and Australia's international obligations;
4. Promoting fair access to and wide dissemination of information and content;
5. Responding to new technologies, platforms and services;
6. Acknowledging new uses of copyright material in the context of the "real world" range of consumer and user behaviour in the digital environment;
7. Reducing the complexity of copyright law by promoting certainty and clarity; and
8. Promoting an adaptive, efficient and flexible policy and regulatory framework.

Issues for comment

Caching, indexing and other internet functions

The Inquiry considers whether reforms to the Act are required to permit the use of copyright material in caching, indexing and other internet-related technical functions that are necessary to the digital economy. In particular, this section of the paper focuses on search engines, web crawlers and reference copies. Under current legislation, there is no specific exception in the Act that permits the copying or reproduction of copyright material for the purposes of caching or indexing. However, sections 43A and 111A of the Act allow for the temporary reproduction of a work, an adaptation of a work, or an audio-visual item as part of the "technical process of making or receiving a communication". There is also a special exception under section 200AAA for proxy level caching for education institutions. It is further noted that several other jurisdictions, such as the US, the UK and New Zealand, have specific exceptions relating to caching and indexing. In addition Division 2AA provides for a limitation of remedies against carriage service providers including where they are involved in "intermediate and transient storage of copyright material in the course of transmission..."The ALRC seeks comments on whether caching, indexing or other internet-related functions are being encumbered by Australia's copyright laws. Specifically, the paper asks whether these exceptions should cover the reproduction and communication of copyright material for the purposes of indexing and caching, and if so, how such exceptions should be framed.

This issue is of particular interest to search engines, carriers, ISPs and content delivery networks, many of whom make intermediate copies of third party material as part or an incidental part of the service that they provide.

Cloud computing

The Inquiry considers whether Australian copyright law hinders the development or delivery of cloud computing services, and whether exceptions in the Act should be amended, or new exceptions created, to account for this technology.

Under current legislation, exceptions that permit users to make copies of particular content for private and domestic use may not apply if the copies are stored on remote computer servers that the user does not own. Moreover, cloud computing service providers may be at risk of infringing copyright in performing necessary technical functions as it is unclear whether such functions are captured by the existing exceptions.

It is also unclear whether cloud services, such as digital lockers, may be used to store and share copyright material acquired illegally.

Given this lack of clarity, the ALRC seeks comment on how copyright law should address the development and delivery of cloud computing services in the digital economy.

The issue is now of particular interest to all cloud service providers. On 7 September 2012 the High Court refused leave to appeal the full court decision in *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (TV Now decision). In that decision the Full Federal Court found on the facts of the particular case that the right to time shift TV programs did not extend to use of Optus' TV Now service online. However, it is not clear from the TV Now decision just which features of Optus' service led to the Full Court's decision and therefore when and in what circumstances lawful personal copying cannot migrate to the cloud.

Copying for private use

The Inquiry considers the operation of the three existing exceptions relating to private use and whether they need to be amended or whether further exceptions need to be introduced. At present, the exceptions in the Act relating to private use are: format shifting, time shifting and back-up and data recovery.

This section asks why format shifting from analogue to digital for films is permitted under the Act, but digital to digital copying is not allowed. The Inquiry also questions whether there should be a right to make multiple copies for multiple devices, given the state of the digital economy and the advancement of cloud computing services.

The Inquiry questions the clarity of the time shifting exceptions in light of the decision in the TV Now decision. In terms of data recovery, the Inquiry considers whether the Act should permit Australians to copy and store their own collections of copyright material, for the purpose of back-up and data recovery, in addition to the specific exception in section 47C for making back-up copies of computer programs.

As such, the ALRC seeks comment on whether the complex private use exceptions can be simplified or consolidated, and whether copying for private use should be more freely permitted.

This area is of vital interest to rights holders. On one view the expansion of personal copying rights has the potential to restrict or remove licensing opportunities and opens the door to products and services that facilitate further copying and, perhaps, increased distribution of infringing copies. On the other hand it is often argued that digital content has become an important item of personal property and means of expressing that should not be devalued by unenforceable restrictions.

Online use for social, private and domestic purposes

The Inquiry considers how home users make creative and non-creative uses of copyright material, particularly via the uploading of user-generated content (UGC) on social networks. Under current legislation, exceptions may apply to some UGC using copyright materials including fair dealing for the purposes of criticism or review, and parody or satire. However, some uses do not fit within the scope of these exceptions - for example, adding a copyright sound recording in a home video.

This section questions whether there should be a principle that permits home use where it does not adversely affect the copyright owner's economic interests - similar to the US "fair use" doctrine (see below).

The ALRC seeks comment on whether online use for copyright materials for social, private and domestic purposes should be more freely permitted. If the Act is to be amended, how should an exception be framed so that the excepted use does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Transformative use

The Inquiry considers whether exceptions should permit "transformative, innovative and collaborative" use of copyright materials to create and deliver new products and services. Transformative use, a concept derived from US law, is where an existing work is transformed into something new - beyond a substitute or derivative. Under the Act, fair dealing exceptions apply to certain transformative work uses. However, not all transformative use will be parody, satirical or critical; or fall within the ambit of the existing exceptions.

In 2011, the Copyright Council Expert Group recommended creating an exception "permitting private, non-commercial, transformative uses [that] would preserve the balance in copyright law between interests of creators and users, and preserve public respect for the relevance and integrity of copyright law" in order to legitimise several existing practices without prejudicing the interests of copyright owners.

Others would advocate allowing transformative uses of works for commercial purposes in order to stimulate innovation and exploitation of the full creative potential of digital technologies.

The ALRC seeks comment on whether the Act should be amended to provide that transformative use does not constitute an infringement of copyright, or whether such use should be more freely permitted. The ALRC also seeks comment on the meaning, scope and framing of a possible exception.

This potential right to make transformative works without the authorisation of the copyright owner may be a new and additional diminution of the rights of copyright owners. Existing rights holders and creators have a material interest in whether a transformative right is created and, if so, how it is framed.

Libraries, archives and digitisation

The Inquiry considers whether the libraries and archives exceptions in the Act are working effectively in the digital environment given the increase in mass digitisation. While there are a number of exceptions under the Act that permit libraries and archives to digitise collection items for defined purposes, there is currently no specific exception that addresses mass digitisation projects or digitisation for the purposes of providing public access to works.



Under section 200AB, any use of a work that is made "for the purpose of maintaining or operating the library of archives" is permitted. However, this provision can only be relied upon if there is no other exception available under the Act, and if the use complies with the three-step test under the Berne Convention.

The ALRC seeks comment on whether the Act should be amended to permit the digitisation of library and archive collections, and if so, what issues would arise.

Orphan works

The Inquiry considers the extent of the orphan works problem in Australia, and how the treatment of orphan works affects the use, access to and dissemination of copyright works. An orphan work is a work whose owner cannot be found.

The proposed models for reform include: centrally granted licences, limiting remedies after diligent search; or extended collective licensing. Australian copyright academics Professor David Brennan and Professor Michael Fraser have also proposed a "non-commercial use exception for natural persons using unpublished subject matter derived from lawfully obtained material" that would apply where the relevant copyright owner is not able to be located after a "diligent search".

The ALRC seeks comment on whether the Act should be amended to create a new exception or to permit a collective licensing scheme for the use of orphan works.

Data and text mining

The Inquiry considers how data mining tools are being used in Australia and whether such uses are impeded by the Act. Data and text mining are automated analytical techniques used across various research sectors such as marketing and medicine. Under the Act, there is no specific exception for data and text mining. It is also unclear whether the current fair dealing exceptions apply to instances where whole datasets need to be copied, or whether copying for data mining would fall under the exception concerning temporary reproduction of works as part of a technical process under s 43B of the Act.

The ALRC seeks comment on whether the Act should be amended to provide for an exception for the use of copyright material for data and text mining and how such an exception should be framed. The ALRC also invites comment on alternative ways to facilitate these types of analytical software.

Since the decision in *IceTV Pty Limited v Nine Network Australia Pty Limited* Australian law has set a high bar for the subsistence of copyright in compilations of data. A data mining exception would take the law one step further to permit the extraction of information from data even where copyright can be shown to subsist. Copyright owners that originate and license access to sporting and statistical information have a close interest the ALRC's recommendation on this issue.

Educational institutions

The Inquiry considers the various free-use exceptions and statutory licensing schemes that apply to the use of copyright material by students and educational institutions. Part VA of the Act involves a scheme for compensating the copying and communication of broadcasts by educational institutions.



Similarly, Part VB involves a scheme for compensating the reproduction and communication of works and periodicals by educational institutions.

The current Act also contains a flexible dealing exception under section 200AB for educational institutions that use copyright material for the purpose of giving educational instruction and not for a profit.

The ALRC seeks comment on the operation of the statutory licensing schemes and other exceptions available to educational institutions, and how these might be amended to operate more effectively. The ALRC also invites comment on whether any uses of copyright material by educational institutions now covered by a statutory licence should instead be covered by a free-use exception—either an existing exception, such as fair dealing for research or study, or any new proposed exception, such as a broad exception based on "fair use."

Crown use of copyright material

At present, the Crown may use others' copyright material without such use constituting infringement if there is a statutory licence in place; if the Crown is expressly immune from civil proceedings; or by way of an implied licence.

The ALRC seeks comment on whether the statutory licensing scheme concerning the use of copyright material for the Crown under the Act is adequate and appropriate in the digital environment, and whether such schemes should apply to local government. The ALRC also invites comment on whether an exception should be introduced to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law beyond the operation of the existing statutory licence scheme.

Retransmission of free-to-air broadcasts

The Inquiry considers whether the retransmission of free-to-air broadcasts should continue to operate as an exception to copyright in broadcasts, and whether the current statutory licensing scheme should apply in relation to copyright materials retransmitted over the internet.

At present, retransmission without the permission of the original broadcaster does not infringe copyright in broadcasts. However, this immunity does not extend to underlying rights holders.

The ALRC seeks comment on whether the statutory licensing scheme for the retransmission of free-to-air broadcasts should apply in relation to retransmission over the internet. In particular, this section asks whether a "must carry" regime, as recommended by the Convergence Review, should be adopted.

A must carry regime which allowed free to air television broadcasters to control retransmission of free to air services combined with an extension of the current statutory licensing scheme to cover retransmission over the internet may facilitate the expansion of subscription television services over the internet and give Free to Air broadcasters greater control over the use of their programs. This issue is of a major commercial significance to the free to air and pay TV services.

Statutory licences in a digital environment

The Inquiry considers the value and operation of statutory licences in the digital environment. The ALRC seeks comment on whether the statutory licensing schemes under the Act are adequate and appropriate in the digital environment, and how these schemes might be simplified or consolidated. In



particular, this section asks whether certain uses of copyright material that are currently covered by statutory licences should instead be covered by a "fair use" exception.

Educators have argued that the existing statutory licensing scheme for educational and other institutions results in payment for copy of works that would otherwise be subject to fair dealing exceptions. The review presents an opportunity for the appropriateness of the existing statutory licensing schemes to be reviewed.

Fair dealing exceptions

The Inquiry considers whether the existing fair dealing exceptions are adequate and appropriate in the digital economy. The Act provides for specific fair dealing exceptions that limit the boundaries of copyright. The exceptions are:

- research and study;
- criticism or review;
- parody or satire;
- reporting news; and
- professional advice (from a lawyer, trade mark attorney or patent attorney).

The ALRC seeks comment on how these fair dealing exceptions can be simplified and whether any other exceptions, such as a fair dealing right of "quotation" should be introduced.

Other free-use exceptions

The ALRC seeks comment on whether certain exceptions should be introduced to or removed from the Act given the unnecessary complexities found in many aspects of the legislation. In addition, this section asks whether free-use exceptions should be simplified or removed entirely.

Fair use

The Inquiry considers whether a US-style "fair use" exception should be introduced. Under the US doctrine, a four factor test requires consideration of the following factors:

- the purpose or character of use;
- the nature of the copyright work;
- the amount and substantiality of the portion used; and
- the effect on the market for or value of the copyright work.

This section also asks whether the position in Australia has changed since the Government's Fair Use Review in 2006.

The ALRC seeks comment on whether the Act should be amended to include a broad, flexible exception based on the notions "fairness" or "reasonableness", and whether such an exception should be in addition to the existing exceptions. The ALRC is also interested in comments on what assistance may be gained from the experience of fair use doctrine in the US.



An open ended "fair use" doctrine is often advocated as necessary to support new and innovative services that make use of existing material in a way that is not permitted under the current regime. Interested parties that with an interest in amending the law to support reference copying and cloud services and new business models may wish to advocate a right of fair use as a possible solution. Compliance with international treaty obligations is raised by the ALRC as an issue which advocates of a fair use exception would need to address.

Contracting out

The Inquiry considers the extent to which copyright owners and users should be permitted to contract out of the operation of an existing exception. Under the current regime, there are no provisions that prohibit agreements from excluding or limiting the operation of exceptions providing for access to copyright material, except in relation to the reproduction of computer programs for specific purposes. Accordingly, parties may agree to exclude or modify the fair dealing exceptions, the statutory licence scheme for educational institutions, or the exception for the use of copyright materials for the services of the Crown. For example, copyright owners of filmed recordings of sporting events may contract out of the reporting of news fair dealing exception. However, the unenforceability of such agreements is questionable.

In 2002, the Copyright Law Review Committee's *Copyright and Contract* Report found that agreements that limit exceptions in the Act "undermine the copyright balance established by" the Act.

The ALRC seeks comment on whether agreements which purport to exclude or limit existing or any proposed new copyright exceptions should be enforceable. The ALRC also invites comment on whether the Act should be amended to prevent contracting out of copyright exceptions, and if so, which exceptions.

What you can do

Submissions are due on **16 November 2012**. Please contact us if you have any questions regarding the review or we can assist you with the preparation of a submission.

For more information contact [Patrick Fair](#).