Australian Digital Alliance

Australian Digital Alliance Policy Forum
Righting the Copyright Imbalance

BACKGROUND INFORMATION

A forum for ADA members, stakeholders and government on the Australian copyright reform agenda

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The purpose of this document is to provide background information on the topics to be addressed at the forum, so as to guide and shape the presentations and ensuing discussions on potential reforms.

Safe Harbours

The safe harbour limitations to intermediary liability are in urgent need of reform because they are too narrow and only protect ISPs. The concept of safe harbours is to protect people who merely provide a service from being liable for the copyright infringement of people who use their service, if the service provider expeditiously blocks access to infringing content once notified. Safe harbours protect ISPs from unnecessary legal risk which enables them to provide services to the public. They also give copyright holders an effective mechanism to manage their rights online, and allow copyright users to challenge whether their use of material is infringing.

The United States first introduced safe harbours to protect: providers of online search facilities (such as Microsoft, Yahoo, Google and nineMSN); providers of online user generated content platforms (such as Blogger, MySpace, Facebook, Bebo, Flickr, Twitter and Wikipedia); and other online information repositories and network operators such as ISPs, universities, schools and cultural institutions. Under the Australia-United States Free Trade Agreement, Australia was required to introduce safe harbours which were closely modelled on those of the United States. However, unlike the United States, in Australia only ISPs are eligible for safe harbours protection.

The impact of limiting eligibility to ISPs means that many types of intermediaries that arguably should be protected, are not. The legal risks to Australian service providers are significantly larger than those to their overseas counterparts. This makes Australia a less attractive business option and results in less access to new and innovative technologies and cultural and educational goods and services. Australia's narrow and impractical safe harbour defences are a serious impediment to the growth of its digital economy. It also means that copyright owners do not have a streamlined and expeditious process to address potential infringements of their copyright in relation to the service providers who are not covered by safe harbours.

The second problem with safe harbours is that they have failed to keep pace with significant changes in the decade since their design, such as technological advancements that allow automated notice procedures by copyright holders and changes in usage and services, for example

the rise of social networking services and user generated content. Safe harbours should accommodate these and future changes in a technologically neutral way that is flexible enough to keep pace with developments in the online environment by answering the core question: what should safe harbours require intermediaries to do and what would alleviate the reasonable concerns of copyright holders?

Discuss how to broaden eligibility for safe harbours to 'service providers' to allow technology innovators and educational and cultural institutions to create and deliver new services and goods with an acceptable level of risk and reasonable obligations to protect the interests of copyright holders.

The iiNet Case

The litigation between ISP iiNet and Hollywood movie studios, currently on appeal in the Full Federal Court, may have an adverse impact on the operations of ADA members in the education, cultural and technology sectors. The case concerns whether the ISP is liable for authorising the infringement of its internet subscribers because it did not take adequate steps to prevent them from engaging in illegal file sharing.

The iiNet case is important because liability for authorising infringement is fundamental in defining the scope of the rights copyright holders are permitted to enforce and control. In the Federal Court, iiNet was found to have not authorised infringement as it: (a) provided a general internet service not a file sharing service; (b) had no powers to cut off peoples' internet access to prevent infringement; and (c) did not encourage infringement. The ADA welcomed this decision, however it could be overturned on appeal.

The spectre of legal risk from an overbroad construction of authorisation poses a great risk to society as it could turn Australian innovation into the copyright ligitation equivalent of Russian roulette. It could foreclose the emergence of new technologies before they are fully considered, require people to take draconian steps to comprehensively limit the use of services to legitimate purposes or force the withdrawal of services altogether. The overall impact may stifle access to knowledge by hamstringing the education, cultural and innovation sectors. Liability for authorisation must strike an appropriate and effective balance between protecting the rights of copyright holders and the public interest in accessing new and innovative services – it should not be broadened any further merely to meet the challenges of new technology.

The second issue that makes the iiNet case important is the practical impact of the trial decision has been to overrule the copyright industry's demands that ISPs must police the activities of their users. This was an important victory for internet users and consumer rights as it rejects calls for the arbitrary termination of internet access. As a matter of principle, access to essential services, such as the internet, should not be terminated without the fundamental protection of independent judicial oversight. The iiNet outcome rejects the infamous 'three strikes' procedure, where subscribers are warned about infringement three times and then their internet is cut off. Three strikes threatens matters of fundamental importance: freedom of communication, expectations of justice and fairness, access to essential services and the digital economy.

Discuss how lowering the threshold for liability for authorisation of copyright infringement and increasing obligations to terminate the internet access of infringers under safe harbours may impact

on ADA members, and how to respond to possible proposals for legislative change following the decision by the Full Federal Court or subsequent appeal to the High Court.

Educational Copying Update

The default position of the statutory licence for the educational copying of a reasonable portion of electronic online material, as currently applied by Copyright Agency Limited, requires payment by schools and universities unless certain specific phrases or indications are found on a website or on the materials. This is contrary to the intention of many creators, specifically those who publish material on the Internet as a means of free publication and self-promotion. It is also contrary to the intention of the legislature, which implemented the statutory licence to provide compensation for reduced physical sales and subscription revenue.

The status quo is not satisfactory as it results in schools and universities overpaying for online material where there is no intention from the creators to receive payment. Copyright law must balance the interests of authors and the need for incentives for creativity on the one hand, and the wider public interest in access to knowledge for the advancement of learning, innovation and research on the other. In keeping with this principle, copyright should only provide for remuneration in so far as it in turn provides an incentive for creation.

Discuss a workable, practical solution to appropriately confine the statutory licence to those cases where the making of multiple educational copies will interfere with a copyright owner's sales or licensing revenue. It must also achieve two key outcomes:

- support the role of copyright in the online world as a vehicle to provide incentives for creation and access to material in the public interest; and

- prevent the unintended exploitation of the education statutory licence to establish an unexpected and unnecessary windfall for the educational use of publicly available and freely provided online content.

Introducing Flexibility

Australia requires the introduction of a flexible fairness based exception. It should be open for any individual or organisation to rely on, permit acts by agents and allow the use of all copyright material for any purpose, including commercial uses – so long as the use is fair. Such an exception would provide an additional mechanism to assist users in ascertaining the fairness of uses which are currently not permitted.

History dictates that Australia's regime of limited copyright exceptions, such as the fair dealing exceptions, can never be comprehensive because they cannot keep pace with new uses of copyright material that are facilitated by technological developments. Each new circumstance that needs to be dealt with by an inflexible copyright regime simply adds to the complexity of the legislation. Extending the current prescriptive model of fair dealing would act as a disincentive to technological development as it would: make copyright law more complex and less user-friendly; increase the legal risk for innovators; and retain the uncertainty which exists in relation to the current exceptions. Doing so would also fail to take into account various Parliamentary inquires which have recommended the adoption of a more flexible model.

Lack of an effective legal mechanism allowing for flexible and fair uses of works discourages further innovation and creation by stifling advancement of the arts and sciences. It is inevitable that socially, economically or culturally valuable uses of copyright material will fall through the cracks inherit in the regime of specific exceptions, with the result that innovation is unduly hindered in Australia. The fair dealing provisions do not fulfil their purpose as they do not provide an effective legislative mechanism by which the interests of copyright users are 'balanced' with those of copyright owners. They are technical, complex, inflexible and not well suited to our rapidly changing technological environment. Fair dealing is out of date and inconsistent not only with the common practices of private citizens but also with the functions of educational and cultural institutions which exist to serve the public.

Australian entrepreneurs and businesses in the innovative technology sector are hampered from fully participating in the digital economy, which is a business area that is growing in significance both globally and in Australia. The lack of a flexible and fairness based exception means that they are exposed to heightened liability for direct or authorised copyright infringement under Australian law compared to other regimes, such as the United States, which is more balanced and fairer to innovators.

A flexible and fairness based exception would also offer significant cultural and artistic value in addition to its potential economic value by permitting, among other things, the transformative or artistic use of material. Transformative use is not facilitated by fair dealing, which prevents creators from reusing copyright materials in the production of new works, counter to the established culture of mashups and remixes.

Discuss creating a new exception that would keep the 'certainty' which exists with the current fair dealing exceptions, but would add much needed flexibility, without unreasonably harming the interests of copyright holders. It should allow owner and user rights to be balanced on a case by case basis and encourage proper risk assessments rather than risk aversion, which has become part of current industry practices.

Search and Caching

Search companies and web 2.0 hosts are required to engage in a number of technical operations in order to offer their services to the public – these technical operations include web searching (crawling, copying and indexing) and caching. The legal treatment of these types of technical operations is unclear and uncertain in Australia. In contrast, these activities can be done with certainty in other jurisdictions, like the United States and Israel, which are more attractive venues for setting up businesses.

The stages of web searching work as follows. Crawling is the automated collection of all the information contained on a website, such as text, meta tags and links. This information is then copied and stored in a central depository. The crawled content is then indexed, allowing information within the pages to be found by users when completing a search engine query. Copies of parts of websites may be made for the purpose of indexing them. In Australia, it is unclear as to whether this activity infringes copyright. Because the process is an essential activity for search engines, which are a fundamental aspect of navigating the internet, it means that businesses chose to base their operations in different countries and Australia loses valuable opportunities.

Orphan Works

The scale and impact of the issues posed by orphan works is immense, reaching prominence in recent times because unbalanced copyright protection is frustrating the growing public expectation that cultural institutions should use digital technologies to make orphan works widely available.

An orphan work is material that is protected by copyright, but the copyright holder is unknown or unlocatable after reasonable enquiries, hence the work is thought of as 'orphaned'. The copyright holder could be the long dead creator of the work, the creator's heirs, a since defunct company and so on.

Orphan works may be published or unpublished, and cover both works and other subject matter, including: letters, photographs, diaries, books, audio histories and home movies. They are commonly understood to be part of collections that contain older, unpublished or one-off items. Although, there is a growing body of 'modern' orphans that are published, but are nonmainstream, noncommercial or are distributed online, outside the realm of traditional publishing. Such works can become orphaned over the passage of just 10 years.

Orphan works cover the breadth of human innovation, and although they may have little commercial value they are of great public value to education, scholarship and creativity. By their very nature, it may be assumed that orphan works are have either little to no commercial value or are not commercially viable. First, it is an established principle that the economic value of copyright material declines as it ages – so old works, old orphan works in particular, tend to have negligible commercial value. Second, most orphan works are not created to be commercially or professionally exploited, or the copyright holder is not even aware of the subsistence of copyright in the material.

The British Library estimates that over 40 percent of all copyright material in existence is orphaned. Unfortunately orphan works are left to languish, locked up by copyright, in the archives of cultural institutions. This situation creates a 'copyright conundrum' because access to orphan works is restricted, even though increasing access would create significant public benefits without unreasonably prejudicing any (unknown or unlocatable) copyright holders.

Absent a legal mechanism to reduce risk, the vast bulk of orphan works cannot be used because the material is protected by copyright but the administrative burden of locating any copyright holders and obtaining permission is prohibitively costly. Seeking permission for unpublished or commercially unavailable works is an onerous and frequently fruitless process, and requires effort and expense beyond what would be reasonably expected.

Discuss options to increase access to orphan works, particularly digitisation and online access, that are free use, do not cause unreasonable prejudice to the interests of creators, and finally, do not place an unreasonable administrative burden on cultural institutions.