ALRC Inquiry - Copyright and the Digital Economy

Rebecca Sadleir and Hamish Collings-Begg consider the recently released Australian Law Reform Commission issues paper on the use of copyright in the digital economy.

Background to the Inquiry

On 20 August 2012, the Australian Law Reform Commission (the ***ALRC***) released an issues paper as part of its inquiry into the use of copyright in the digital economy.[1] The inquiry recognises that Australian copyright laws are no longer adequate in light of the rapidly developing technological environment in which they operate, and seeks public submissions on possible reforms.

The relevance of this inquiry to the general public is exemplified by the high-profile *Optus TV Now* case.[2] On 7 September 2012, the High Court refused Optus' application for special leave to appeal, and Optus has now publicly stated that it will turn to this inquiry in the hope of reform to the law. Optus' vice-president of corporate and regulatory affairs, David Epstein, has said:

> Our service is a high-profile example of the kind of breakthroughs that can be delivered using the latest mobile, computing and cloud technologies … It's essential we encourage and support innovation and investment in these new markets. If we don't, we'll end up buying services from overseas rather than building a domestic digital economy.[3]

Overview

The issues paper defines the digital economy as 'the global network of economic and social activities that are enabled by information and communications technologies, such as the internet, mobile, and sensor networks', and recognises that the Australian economy is moving towards a greater reliance on high-efficiency, knowledge-intensive industries.

The issues paper calls for public submissions on over 50 questions, covering 16 broad areas identified by the ALRC. For each of these areas, the paper considers options to achieve greater availability of copyright material in ways that are socially and economically beneficial. The paper considers in detail the possibility of a generalised 'fair use' exception to replace many specific areas which are currently covered by an exception, whilst seeking to remain flexible to the possibility of new areas that require exceptions to copyright infringement.

The scope of the inquiry is limited to considering exceptions to copyright and statutory licensing schemes, and does not cover more radical options, such as an 'opt-in' or 'opt-out' regime for copyright protection.

Guiding principles for reform

The paper sets out eight key principles, according to which the reforms should:

(a) promote the development of a digital economy by providing incentives for innovation in technologies and access to content;

(b) encourage innovation and competition and not disadvantage Australian content creators, service providers or users;

(c) recognise the interests of rights holders and be consistent with Australia's international treaty obligations, including the *Berne Convention*;[4]

(d) promote fair access to and wide dissemination of content;

(e) ensure copyright law is able to respond adequately to technological change;

(f) acknowledge the 'real world' ways that copyright materials are used;

(g) promote clarity and certainty for creators, rights holders and users; and

(h) promote an adaptive, efficient and flexible framework.

The following is an overview of the 16 key areas identified by the issues paper.

Australian copyright laws are no longer adequate in light of the rapidly developing technological environment in which they operate

Caching, indexing and other internet functions

The paper considers the processes of caching, indexing and similar technical functions, which are essential to the efficient operation of the internet.

It is currently unclear whether caching and indexing infringe copyright. The processes can involve the copying of works and communicating them to the public, for example when a search engine displays its results. There are several current exceptions which may arguably apply - the exceptions allowing temporary reproduction of material as part of a 'technical process of making or receiving communication';[5] reproduction of material on the system of a carriage service provider in response to an action by a user, to facilitate efficient access to that material;[6] and automated caching by an educational institutional for certain purposes[7] - but these exceptions may not adequately cover caching and indexing.

The ALRC suggests that reform of this area of the law may include clarifying or broadening the current exceptions, creating a new specific exception, or creating a broad and flexible exception to permit these processes. The paper notes how other jurisdictions, such as the UK and Canada, have specific exceptions allowing caching, whereas the US allows caching under a fair use doctrine.

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1 The Australian Law Reform Commission, *Copyright and the Digital Economy,* Issues Paper (2012) is available at http://www.alrc.gov.au/publications/copyright-ip42.

2 *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147.

3 David Epstein, 'The law left behind by technology' (10 September 2012) *Australian Financial Review*, http://afr.com/p/opinion/the_law_left_behind_by_technology_ayRHLRzGN8zRugjYDNgqEJ (accessed 10 September 2012).

4 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

5 *Copyright Act 1968* (Cth) ss 43A, 111A.

6 Ibid, ss 116AB, 116AG.

7 Ibid, s 200AAA.

Cloud computing

The issues paper highlights the increasing use of cloud computing services for storage and content delivery, and recognises that cloud computing represents a major development in the digital environment. Use of cloud computing services can facilitate copyright infringement, for example where illegally-obtained content is uploaded to the cloud, or where content is copied to the cloud for download to multiple devices (a key issue in the *Optus TV Now* case). This is not only an issue for end users, and the paper highlights the risks that companies offering cloud computing services are exposed to under the current law.

The issues paper seeks views on whether current copyright law is impeding cloud computing services, and whether exceptions in the *Copyright Act* should be amended or introduced to account for this technology.

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Copying for private use

The paper considers the three exceptions which allow copying for private use, and seeks public comment on whether they should be clarified or expanded.

(a) First, the *format-shifting* exception, which allows users to make copies of copyright material into other specified formats.[8] The paper notes in particular that this may not apply to cloud computing services, nor to the digital-to-digital copying of films.

(b) Secondly, the *time-shifting* exception, which allows users to make copies of certain materials to watch at a more convenient time.[9] The issues paper notes the importance of the time-shifting exception in relation to cloud computing, and content made available using the internet or internet protocol television (IPTV).

The ALRC stresses the importance of wording this exception so as not to exclude future technological developments. It also notes that the issue which arose in the *Optus TV Now* case – that is, whether the time shifting exception applies to copying by a company on behalf of an individual – should be considered in the reforms. In this context, the issues paper considers whether a simplified exception for reproductions for private purposes is needed, or alternatively whether a broad and flexible 'fair' or 'reasonable' use exception is preferable.

(c) Thirdly, the paper considers the exception allowing the copying and storage of copyright material for the purpose of back-up and data recovery.[10] Again, this is highly relevant in the cloud computing context.

Online use for social, private or domestic purposes

The paper notes the widespread use of copyright materials for social, private and domestic purposes, specifically the uploading and sharing of non-commercial user-generated content on social networking and other sites. User-generated content may include the use of excerpts from copyright materials, such as movies or music, in combination with 'a certain amount of creative effort' from the individual, for example, the adding of a commentary to the work. The paper notes that existing fair dealing exceptions may apply to user-generated content, such as for the purposes of criticism or review, or parody or satire.[11]

The issues paper considers whether a new specific exception should be introduced, allowing user-generated content that does not unjustifiably harm copyright owners, or whether a broader fair use doctrine would be more appropriate.

Transformative use

The issues paper distinguishes 'transformative works' from user-generated content, on the basis that transformative works transform pre-existing works to create something new. Common forms of transformative works are 'sampling', 'remixes' and 'mashups', all of which may be made in commercial and non-commercial contexts.

These types of works may only in some cases be covered by the fair dealing exceptions. They may also infringe an author's moral rights.[12]

The paper considers a number of options for reform, such as an exception for non-commercial, transformative uses - as has been introduced recently in Canada - or a broader flexible exception for 'fair' or 'reasonable' use.

Libraries, archives and digitisation

Many cultural institutions are undertaking a process of converting works they hold into a digital format, for the purposes of better preservation and wider dissemination. Digitisation may constitute copyright infringement, as it involves the reproduction, and often communication, of copyright material. The cost of obtaining the requisite licences constitutes a barrier to digitisation for libraries and archives.

The ALRC asks whether the *Copyright Act* should be changed to permit a wider range of digitisation practices by libraries and archives, whether a specific exception is required and, if so, whether it should be limited to non-commercial use that does not interfere with the copyright owner's market. The ALRC also considers whether a broad and flexible 'fair' or 'reasonable' use exception would be more appropriate in the context.

Orphan works

Orphan works are works of which the author or owner cannot be found by a person wishing to make use of the work. The paper considers several models for orphan works, and seeks comment on which is most appropriate.

(a) First, a 'centrally granted licence' scheme, which allows a user to obtain a non-exclusive licence to use an orphan work, after reasonable efforts have been made to locate the owner. A royalty fee is paid to a central administrative body. This model is currently in use in Canada.

(b) Secondly, limitations on the monetary and injunctive relief available to an owner, where the user of an orphan work has conducted a reasonably diligent search.

(c) Thirdly, an extended collective licensing scheme where users pay licence fees to a statute-appointed body, which is authorised to grant licences for specific purposes on behalf of copyright owners.

(d) Finally and more generally, a non-commercial use exception for use of unpublished orphan works.

Data and text mining

Data and text mining involves copying and analysing electronic information. The paper notes the growing value and usage of these tech-

8 Ibid, ss 43C, 47J, 110AA, 109A.

9 Ibid, s 111.

10 Ibid, s 47C.

11 *Copyright Act 1968* (Cth) ss 41, 103A; and 41A, 103AA respectively.

12 As was recently considered in *Perez v Fernandez* (2012) 260 FLR 1.

niques in Australia. Currently, these processes may constitute copyright infringement, unless they are covered by a fair dealing exception, which is often not the case. The paper considers whether a specific data mining exception should be created and, if so, whether it should be confined to non-commercial research.

Educational institutions

There are currently two statutory licensing schemes which provide for the use of copyright material by educational institutions.[13] These schemes have been criticised, as fees are now collected for uses of otherwise free and publicly available material on the internet. Section 200AB of the *Copyright Act* provides an exception to infringement for the purpose of giving educational instruction and not for a profit, but this does not apply when one of the two schemes applies. The relationship between the schemes and the fair dealing exception for the purpose of research or study is unclear.

The ALRC seeks comment on how the exceptions could operate more effectively, and how the licensing schemes might be simplified.

Crown use of copyright material

The ALRC seeks comment on whether the current Crown use regime in the Copyright Act is appropriate, and whether the scheme should apply to local government.

Retransmission of free-to-air broadcasts

The copyright in free-to-air broadcasts are not infringed by retransmission of them, provided that remuneration is paid under the statutory licensing scheme.[14] This exception does not apply to retransmission which takes place over the internet.[15] The scheme provides for compensation of underlying rights holders, but not the free-to-air broadcasters.

The ALRC seeks comment on whether this exception should continue to operate, and whether it should be extended to broadcasts retransmitted over the internet.

Statutory licences in the digital environment

The paper notes that improvements in the digital economy may offer opportunities to improve the operation of statutory licensing schemes. In particular, it notes how the internet can facilitate micro-licensing, by bridging the gap between rights holders and users. The ALRC seeks comment on whether the current licensing schemes are adequate and appropriate in the digital environment, or whether new schemes should be created.

Fair dealing exceptions

The paper notes the current fair dealing exceptions to infringement, which allow for the use of materials for the purposes of research or study, criticism or review, parody or satire, reporting news, and for legal practitioners and patent and trade mark attorneys in giving professional advice.[16]

The paper considers whether these exceptions are adequate and appropriate in the digital environment. In particular, it considers simplification of the fair dealing exceptions, to create one fair dealing exception, which contain a non-exhaustive list of purposes, as well as a list of factors to be taken into account when considering if the dealing is 'fair'. The paper also considers whether there should be a specific fair dealing exception for the purposes of quotation.

Other free-use exceptions

The paper makes the general comment that the current suite of statutory exceptions are unnecessarily complex. The ALRC seeks suggestions on how these exceptions might be simplified and better structured, to be more straightforward and comprehensible.

Fair use

At multiple instances throughout the paper, the ALRC questions whether a more general 'fair use' exception would provide a more effective and appropriate system for exemption from infringement. The US copyright regime currently includes a fair use exception under which, to determine whether a use is 'fair', courts must consider:

(a) the purpose and character of the use;

(b) the nature of the copyrighted work;

(c) the amount and substantiality of the portion used; and

(d) the effect upon the market for the copyrighted work.

Arguments in favour of a fair use model are that it:

(a) enhances flexibility and timely responses to rapid technological changes;

(b) assists innovation; and

(c) can improve upon the utilisation of the current exceptions, which have been criticised as being too uncertain.

Arguments against an open-ended model are:

(a) the possible uncertainty of its application (although the paper notes that 'fair use' has proven to be a sufficiently certain term in the US);

(b) the need for litigation to determine its scope;

(c) the possibility of a 'chilling effect' in respect to the use of copyright material; and

(d) the lack of jurisprudence on the area in Australia.

The ALRC seeks comments, given the recent advances in technology, on whether a broad, flexible exception to copyright would now be possible and appropriate and, if so, how it should be framed.

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Contracting out

Finally, the paper considers and invites comment on whether copyright owners and users should be permitted to contract out of the operation of an exception.

Process and Timing

Submissions on the 55 questions posed in the issues paper close on 16 November 2012. The ALRC is scheduled to release a discussion paper in mid-2013 including draft recommendations for reform. Following a further round of public consultation, the ALRC is due to deliver a final report to the Attorney-General by 30 November 2013.

Rebecca Sadleir is a special counsel and Hamish Collings-Begg is a Law Graduate in the Intellectual Property Practice Group at Allens. The views expressed in this article are personal to the authors and do not represent any organisation.

13 *Copyright Act 1968* (Cth) Pt VA, Pt VB.

14 Ibid, s 135ZZK.

15 Ibid, s 135ZZJA.

16 See *Copyright Act 1968* (Cth) ss 40(1), 103C(1); 41, 103A; 41A, 103AA; and 43(2) respectively.