

The ALRC Proposes Significant Changes to Australian Copyright Law

Michael Lagenheim provides an update on the status of the ALRC's reform of copyright law in the digital environment.

In June 2012, the Australian Law Reform Commission (ALRC) received its terms of reference for the current *Copyright and the Digital Economy* inquiry requiring the ALRC to report on whether the exceptions and statutory licences in the *Copyright Act 1968* (**Copyright Act**) are appropriate in today's digital environment. The terms of reference require the ALRC to have regard to providing incentives to create and disseminate original copyright material, the general interest of Australians to access and use content,

the retransmission of FTA and radio broadcasts no longer need to be facilitated in a converged media environment and the extent to which retransmission takes place should be left to the market to determine

the importance of the digital economy and Australia's international obligations.

The ALRC released an issues paper in August 2012¹ and a discussion paper in June 2013 in which a number of significant changes to the Copyright Act are proposed, including:

- the introduction of a fair use exception to copyright infringement (and a consequent repeal of existing more specific exceptions);
- the repeal of statutory licences for educational institutions and governments;
- options for amending the provisions relating to the retransmission of broadcasts; and
- the extension of the broadcast exceptions to include internet transmission.

The introduction of a fair use exception

The Copyright Act provides for copyright exceptions in a number of areas, including fair dealing for research or study,² criticism or review,³ parody and satire,⁴ and purposes of reporting news,⁵ reproduction for the purpose of judicial proceedings or professional advice,⁶ copying sound recordings for private and domestic use,⁷ reproducing works in books, newspapers and periodicals for private use (format shifting),⁸ and recording broadcasts to replay at more convenient time (time shifting)⁹.

This fragmented and restrictive approach and the technical nature of the provisions have led to the criticism that Australian copyright law is out of touch with modern technological developments. In contrast, a fair use approach has been enacted in a number of countries, most notably the US.¹⁰ It involves a case by case assessment of whether a particular use is fair and therefore does not infringe copyright.

Arguments in favour of a fair use approach include that it provides greater flexibility (a principle based and technology neutral approach) and assists innovation (there is no automatic prohibition on a use). It also restores balance (to what would otherwise be an unreasonable broad grant of rights to content creators with an unduly narrow set of exceptions) and better aligns copyright law with the reasonable expectations of most users of copyright material.

Those opposed to the fair use approach argue that there is no case made out for its introduction and it would create uncertainty and expense (due to the need for increased legal advice and litigation).

The ALRC proposes that the Copyright Act should provide a fair use exception to copyright infringement¹¹ and that a

1 The ALRC received 295 submissions in response, including submissions from collecting agencies, content creators, telecommunications companies, ISPs, broadcasters, Pay TV operators, the ACC and various industry associations.

2 ss40 and 103C, Copyright Act.

3 ss41 and 103A, Copyright Act.

4 ss41A and 103AA, Copyright Act.

5 ss42 and 103B, Copyright Act.

6 ss43 and 104, Copyright Act.

7 s109A, Copyright Act.

8 s43C (Books, newspapers and periodicals), s47J (photographs) and s110AA (films) Copyright Act.

9 s111, Copyright Act.

10 Other countries include South Korea, Israel and the Philippines

11 ALRC, *Discussion Paper: Copyright and the Digital Economy* 79, 2013, proposal 4-1 and 4-2 (**Discussion Paper**)

non-exhaustive list of **fairness factors** should be considered in determining if a use is a fair use. The fairness factors would include the purpose and character of the use, the nature of the copyright material, the amount and substantiality of any part of the copyright material used in relation to the whole and the effect of the use.¹²

In addition, the ALRC submits that the Copyright Act should specify a set of **illustrative uses**, that is, uses that may qualify as fair uses, including research or study, criticism or review, parody or satire, reporting news, non-consumptive, private and domestic, quotation, education and public administration.¹³

The ALRC proposes that the fair use exception be applied (with the consequential repeal of the related specific exceptions) when determining whether the following infringe copyright:

- a use for the purpose of research or study, criticism or review, parody or satire, reporting news or professional advice;¹⁴
- a use for caching, indexing or data and text mining (non-consumptive use);¹⁵
- a private and domestic use;¹⁶
- back-up and data recovery;¹⁷
- a transformative use;¹⁸
- quotation;¹⁹
- use of copyright material not covered by specific libraries and archives;²⁰
- use of an orphan work;²¹
- an educational use;²² and
- a government use.²³

The abolition of statutory licences for educational institutions and governments

A statutory licence allows for certain uses of copyright material without permission of the rights holder, subject to the payment of a reasonable remuneration.²⁴ There are two statutory licence schemes in the Copyright Act. The first scheme relates to educational institutions,²⁵ copying and communicating broadcasts,²⁶ and the reproduction and communication of works and periodical articles.²⁷ The second scheme relates to government use for the services of the Commonwealth or State.²⁸

These schemes also require the payment of fees (equitable remuneration) to collecting societies.²⁹

The ALRC proposes the abolition of these schemes on the basis that licences for such use of copyright material should be negotiated voluntarily.³⁰

Reform to retransmission of FTA broadcasts

Under the *Broadcasting Services Act 1992* (Cth) (**Broadcasting Services Act**), the retransmission of a free to air (FTA) broadcast does not infringe copyright in the broadcast so long as it is from a national broadcasting service or a commercial broadcasting service (within the area of its licence).³¹ In addition, the Copyright Act provides a statutory licence scheme for the underlying works if equitable remuneration is paid³². The retransmission scheme favours cable and satellite based pay TV providers as the arrangement does not apply to retransmission over the internet.³³

Many stakeholders favour removal of the internet exception including the ACCC, Telstra, the Australian Copyright Council, the ABC and Optus while others, including rights holders

12 Discussion Paper, proposal 4-3.

13 Ibid, proposal 4-4.

14 Ibid, proposal 7-1.

15 Ibid, proposal 8-1. There is no specific exception in the Copyright Act that permits copying or reproduction of copyright material for the purposes of caching or indexing.

16 Ibid, proposal 9-1. The current format shifting and time shifting provisions are considered too prescriptive and inflexible.

17 Ibid, proposal 9-3.

18 Ibid, proposal 10-1. A transformative use is one where a pre-existing work is used to create something new

19 Ibid proposal 10-2.

20 Ibid proposal 11-2.

21 Ibid proposal 12-1. An orphan work is copyright material where the owner cannot be identified or located by someone wishing to obtain rights to use the work.

22 Ibid proposal 13-1.

23 Ibid proposal 14-1.

24 It is argued that these licences are appropriate when there is market failure, ie where the costs of identifying and negotiating with copyright owners outweighs the value of the licence

25 These schemes also apply to institutions assisting persons with a print disability

26 Part VA, Copyright Act.

27 Part VB Copyright Act.

28 Part VII, Div 2, Copyright Act.

29 The collecting societies in turn distribute the fees to members.

30 Discussion Paper, Proposal 6-1.

31 s212, Broadcasting Services Act.

32 s135ZZK, Copyright Act.

33 s135ZZJA, Copyright Act.

such as the Australian Football League (**AFL**) and the National Rugby League (**NRL**), oppose it.

The retransmission scheme favours cable and satellite based pay TV providers as the arrangement does not apply to retransmission over the internet.

The ALRC noted that the potential reforms have an impact on communications and competition policy, and consequently proposed two alternative options in the discussion paper. The first option is that the broadcast copyright exception and the statutory licensing scheme be repealed so that the extent to which retransmission occurs will be entirely a matter of negotiation between the parties.³⁴ This option assumes the retransmission of FTA and radio broadcasts no longer need to be facilitated in a converged media environment and the extent to which retransmission takes place should be left to the market to determine.

The second option is that the broadcast copyright exception should be repealed and replaced with a statutory licence and that retransmission over the internet should no longer be excluded.³⁵ This option assumes a continuing need to facilitate the retransmission of FTA TV and radio broadcasts.

The broadcasting reforms

There are a number of broadcast exceptions in the Copyright Act. The Copyright Act defines 'broadcast' to mean a communication to the public by a 'broadcasting service' which is defined in the Broadcasting Service Act as a service that delivers TV and radio programs to persons having equipment to receive that service, whether using radiofrequency, cable, fibre, satellite or other means.

The ALRC proposals represent an important development in Australian copyright law. They involve a step towards the simplification of the law, greater flexibility and technology neutrality and bring Australian copyright law more in line with the approach adopted internationally

A ministerial determination in 2000 excluded a service that made TV and radio programs available over the internet from the definition of a 'broadcasting service'. The determination was intended to ensure that internet streaming services were not regulated by the Broadcasting Services Act, however, it has had the unintended consequence that while FTA and pay TV transmissions are covered by exceptions in the Copyright Act, transmission of TV services over the internet are not.

The ALRC proposes that the Copyright Act should be amended to ensure the following broadcast exceptions (to the extent they are retained) also apply to the transmission of TV or radio over the internet: broadcasts of extracts of works, reproduction for broadcasting, sound broadcasting by holders of a print

disability radio licence, incidental broadcast of artistic works, broadcasting of sound recordings, broadcasts for persons with an intellectual disability, reception of broadcasts and use of broadcast for educational purposes.

Conclusion

It is clear that some new services have emerged in the digital economy which are placing strain on Australian copyright law. One important example is cloud computing, an internet based service where digital content is stored in remote servers and then delivered on demand to customers.

The Optus TV Now service was a cloud based service where Optus offered its customers a service which allowed them to record and view copies of FTA broadcasts of NRL and AFL games and then play them back at a later time. If those customers had used their own video recorders at home to record the programs there would not have been a breach of the Copyright Act. However, the Full Federal Court held that Optus had made the copies of the relevant games and was therefore in breach of the Copyright Act.³⁶

The ALRC proposals represent an important development in Australian copyright law. They involve a step towards the simplification of the law, greater flexibility and technology neutrality and bring Australian copyright law more in line with the approach adopted internationally.

The proposals are likely to be well received by those in the technology industries such as ISPs and the educational sectors. Existing rights holders such as content creators, TV stations and collecting agencies will be concerned that the changes may allow some additional uses without requiring the payment of licensing fees.

Submissions in response to the ALRC's discussion paper closed on 31 July 2013 and a final report is due on 30 November 2013. Whether any of the recommendations are accepted and implemented will depend on the political will of the government of the day and where copyright reform sits in the scheme of legislative priorities.

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34 Discussion Paper, Proposal 15-1.

35 Discussion Paper, Proposal 15-1 and 15-2.

36 *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.