

The “It’s Complicated” Relationship Between Social Media and Australian Copyright Law

Amanda Parks considers copyright laws in the context of social media use and the ALRC’s recommended introduction of a flexible fair use exception.

Can the ALRC’s fair use exception help?

Following Oxford Dictionaries’ decision to crown *selfie* as ‘Word of the Year’ for 2013, we saw a particularly famous one ‘break’ Twitter and spark a copyright debate after this year’s Oscars awards show (marking quite a change from the ever-so-predictable fashion debate that inevitably follows the event). This year, host Ellen Degeneres shared a star-studded photo that was retweeted over 2 million times in 2 hours, and questions quickly arose as to why the Associated Press sought *her* permission to share it when it was *Bradley Cooper* who pressed the button.

What happens on social media is a hot topic in any discussion about how copyright laws do and should operate in the online world. Only a few months ago, the Australian Law Reform Commission (**ALRC**) concluded its 18-month enquiry entitled *Copyright in the digital economy*, tabling its Final Report in Parliament on 13 February. The ALRC was tasked with considering whether and how the *Copyright Act 1968* (Cth) (**Act**) should be updated to account for developments in the digital space, and it ultimately recommended the introduction of a flexible fair use exception.

While the social media sphere is bursting with benefits for its many users, it can also present a number of challenges for those who are concerned about the potential for their copyright materials to be shared with incredible ease, speed and reach, yet without their consent.

The nature of copyright infringement by the casual social media user

The sharing of content on networks like Facebook and YouTube has spread with great contagion, yet many social media users do not realise that their activities may involve breaches of copyright (however harmless those breaches may seem to some). Copyright concerns can arise when social media users share, as they so often do, content constituting or incorporating all or part of someone else’s material. Consider these two recently-observed examples:

Example 1:

Facebook User A posts a status update in the following terms: “Where do you guys find all of your great cover photos? I often see things that I like when I’m browsing the internet, but I don’t want to infringe copyright.” Facebook User B responds: “If it’s on the internet and it’s not watermarked, it’s fair game”. Within a day, User A has thanked User B for the ‘advice’ and replaced her old photo with an image that has almost certainly been copied from a third party’s website.

Example 2:

Another Facebook user celebrates Australia Day by posting an artist’s creative image of the Sydney Opera House to her personal page, with the following comment: “Taking this opportunity to share some love through art. If you like this post, you will receive an artist and will need to

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In the second of a two part special, Peter Leonard provides a thoughtful commentary on privacy reforms. In Part 1 published in the previous edition, he provided a high level overview of the amendments to the Privacy Act 1988 and the new Australian Privacy Principles. In this Part 2, he provides an in depth analysis of Australia’s privacy regime, focusing on the APPs, the regulation of privacy beyond the Privacy Act 1988, issues of extraterritoriality and emerging trends and issues.

Exercising Jurisdiction Over Foreign Corporations: The USA PATRIOT Act and the Extent to Which US Government Law Enforcement Agencies can Obtain Information from Abroad

Ken Wong considers the implications of the PATRIOT Act on the ability of US Government law enforcement agencies to obtain information from abroad.

Profile: Fiona Lang - COO of BBC Worldwide Australia

In a new feature for the Communications Law Bulletin, Daniel Doctor, a member of CAMLA’s young lawyers committee, chats to Fiona Lang, the new COO of BBC Worldwide Australia and New Zealand, about her new role and what she sees as the key challenges and trends in the Australian media industry.

The Deregulation Agenda for Australian Media Ownership: Can Competition do the Heavy Lifting?

In light of recent comments from the Communications Minister, Barry Dean, Jennifer Dean and Shyla Sharma consider the potential impact of reform of Australian media ownership regulation.

post an image of his/her art. Let’s share some art love.” Predictably, this receives several ‘likes’ from other users who continue to post the works of their allocated artists, and so the snowball rolls on...

there is often a disconnect between what the law actually allows and what the average person thinks or assumes is allowed

Most likely, these Facebook users would be found to have infringed copyright in the works they shared because their conduct does not fit within an existing fair dealing exception in the Act, such as use for the purpose of criticism or review (sections 41 and 103A) or parody or satire (sections 41A and 103AA). Equally likely is the probability that these participants are completely unaware that their conduct amounts to an infringement of someone else’s rights; these examples illustrate the point made by many who support the introduction of a flexible fair use exception, which is that there is often a disconnect between what the law actually allows and what the average person thinks or assumes is allowed.

One of the questions that have been so hotly debated in recent months is this: should these types of content-sharing activities constitute copyright infringement? Many have argued not, insisting that Australian copyright laws should be updated to better reflect the reasonable expectations of the public, as well as the realities of participation in the online world. This begs the next question: would these types of content-sharing activities constitute infringement under the ALRC’s proposed fair use exception?

The proposed exception

In its Final Report, the ALRC recommended the introduction of a flexible fair use exception that should include:

- 1 an express statement that a fair use of copyright material does not infringe copyright.
- 2 a non-exhaustive list of ‘fairness factors’ to be considered in determining whether a use is fair, being the:
 - (a) purpose and character of the use;
 - (b) nature of the copyright material;
 - (c) amount and substantiality of the part used; and
 - (d) effect of the use upon the potential market for, or value of, the copyright material; and
- 3 a non-exhaustive list of illustrative uses or purposes that may qualify as fair use, including research or study; criticism or review; parody or satire; reporting news; professional advice; quotation; non-commercial private use; incidental or technical use; library or archive use; education; and access for people with disability.

The proposed fair use exception expands the permissible uses of copyright material beyond those that are currently provided for in the Act’s fair dealing provisions. Those provisions provide exceptions for the purposes of research or study, criticism or review, parody or satire, reporting news and professional advice, but they are closed-ended, prescriptive exceptions that require a use of copyright material to be for one of these specific purposes. In contrast, the proposed fair use exception involves an open-ended, principles-based approach to assessing whether a use of copyright material is fair, having regard to the ‘fairness factors’ and with reference to the ‘illustrative purposes’ for which a particular use is more likely to be considered fair.

Interestingly, ‘social use’ was deliberately excluded from the ‘illustrative purposes’ list; the ALRC considered that social use will often not be fair, particularly where it harms rights holders’ markets and is not ‘transformative’ (meaning use for a different purpose than that for which the material was created). The ALRC also clarified that social use should not be interpreted as falling within the category of ‘non-

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commercial private use' because many social uses will not in fact be private (citing as examples the acts of sharing copyrighted songs or videos on YouTube or Facebook).

Nevertheless, the ALRC indicated that certain social uses of copyright material (particularly transformative uses) may be fair, such as use for the purpose of creating and sharing user-generated content. A particularly popular type of user-generated content is the meme, a classic example of which is 'Grumpy Cat.' For those who have managed to miss this, it involves a photo of a cat overlaid with varying comedic captions playing on the cat's less-than-impressed facial expression. Currently, the act of sharing 'Grumpy Cat' with 800 Facebook friends might be an exception to infringement if it can be viewed as a parody or satire, but not all memes can be so classified. Under the proposed fair use exception, there would be more scope for this to be considered an exception, as the primary question would not be whether the meme is a parody or satire, but rather, whether the use of the relevant copyright work is fair.

Ultimately, the ALRC concluded that social use must be considered on a case-by-case basis by reference to the fairness factors.

What next

It is unclear when the government will formally respond to the ALRC's Final Report, but Attorney General George Brandis delivered a speech to the Australian Digital Alliance on 14 February in which he said he remains unpersuaded that a fair use exception is the best direction for Australian law (though he maintained that he will "bring an open and inquiring mind to the debate").

Given that the posting and sharing of copyright materials via social media is unlikely to abate, copyright owners should evaluate how, or even whether, they should take action. Some might consider taking proactive steps to prevent their content from being shared, such as displaying copyright notices on websites or applying watermarks to images. Others may actually benefit from having their work shared by and between hundreds or thousands (or even millions) of users on social networks; there is arguably no better advertising and no faster way to be 'discovered.' Those eager to share their work may want to consider making it available via Creative Commons; there are several standard licences which allow artists to select the terms upon which they are content for their works to be shared, and help to ensure that those who make their works available are appropriately credited.

While we wait to see whether the proposed fair use exception will become law, it is worth evaluating whether something can be gained by swimming *with*, not *against*, the social media current.

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CAMLA's Annual Trivia Night is on the approach!

Start hitting the books and NW Magazine now!

Thursday 14th August
6:00pm for 6:30pm start

NSW Leagues' Club
Level 2, 165 Phillip St
SYDNEY

CAMLA members to receive further information shortly but please register your early interest by emailing camla@tpg.com.au

