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Australian Libraries Copyright Committee



AUSTRALIAN
DIGITAL ALLIANCE

Copyright Legislation Amendment

Fair Go for Fair Use Bill 2013

*Submission by the Australian Digital Alliance and Australian Libraries
Copyright Committee to the House Standing Committee on Environment
and Communications*

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About the Australian Digital Alliance

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, libraries and individuals.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that appropriately balances the interests of rights holders with the interests of users of copyright material.

About the Australian Libraries Copyright Committee

The Australian Libraries Copyright Committee is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- Australian Library and Information Association
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia
- Australian Government Libraries Information Network
- The Australian Society of Archivists

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Executive summary

The ADA and ALCC thank the Committee for the opportunity to provide comment on this inquiry into the *Copyright Legislation Amendment “Fair Go for Fair Use” Bill 2013* (the Bill).

Australia’s copyright system is not working effectively. Uncertainties regarding the legal status of essential processes such as caching and buffering, excessively technical restrictions on personal use that treats media differently depending on its format and ridiculous restrictions that make it impossible for libraries, archives and museums to adequately preserve Australia’s heritage to world standards are just some of the current problems¹. We believe that copyright reform, including the introduction of a ‘fair use’ exception similar to that proposed in this bill, is important to ensure Australia has an adaptable, technologically neutral copyright system suitable for the digital economy.

Background to the inquiry

Copyright law reform is the subject of several inquiries at the moment, most notably the Australian Law Reform Commission’s (ALRC) *Copyright and the Digital Economy* inquiry², to which we have made two comprehensive submissions³ and whose final report is due in November. We note that this current inquiry was started before the release of the ALRC Discussion Paper, which included proposals that would amend the *Copyright Act 1968* (the Act) by replacing most of the current narrow exceptions with a flexible ‘fair use’ exception⁴. This provision was drafted without the benefit of the ALRC’s consideration as to the most suitable language for Australian copyright law.

We also note the importance of the recent bipartisan House of Representatives Committee Inquiry *At what cost? IT pricing and the Australia Tax* (IT Pricing

¹ See ADA/ALCC *Submission to the ALRC Copyright and the Digital Economy Discussion Paper* (2013) for a more thorough treatment of the current issues in copyright law
http://www.alrc.gov.au/sites/default/files/subs/586.org_the_australian_digital_alliance_and_australian_libraries_copyright_committee.pdf

² Accessible online at <http://www.alrc.gov.au/publications/copyright-ip42>

³ ADA/ALCC *Submission to the ALRC Copyright and the Digital Economy Issues Paper*
http://www.alrc.gov.au/sites/default/files/subs/213.org_adaandalcc.pdf

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⁴ The ALRC

Inquiry)⁵ and the Attorney General's-Department's (AGD) *Review of Technological Protection Measure Exceptions* (TPM Review)⁶ which has yet to be publicly released. It also comes in the context of the recently concluded WIPO *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*⁷ and the ongoing negotiations for the free trade agreement, the *Trans-Pacific Partnership Agreement* (TPP)⁸.

Internationally many countries are currently reviewing their copyright regimes. Canada⁹ and the UK¹⁰ have recently undertaken wide ranging reviews and reforms while the USA is currently reviewing copyright in light of the digital economy¹¹.

Domestically, the need for reform has long been recognised. Australia has been thinking about introducing fair use for a long time. A flexible copyright exception was first recommended for introduction in Australia in 1998¹² and a fair use exception was recommended by Parliamentary Committees in 2004¹³. The House of

⁵ House of Representatives Committee *At what cost? IT pricing and the Australia Tax*
http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/report.htm

⁶ Attorney General's Department *Review of Technological Protection Measure Exceptions*
<http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/CurrentIssuesReformsandReviews/Pages/ReviewofTechnologicalProtectionMeasureexceptions.aspx>

⁷ Full text of the treaty is available here http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=245323 Australia is not yet a signatory, however we would hope that the Parliament is mindful of the contents of the treaty in its current deliberations.

⁸ The text of the TPP is under negotiation and not publically available. The ADA and ALCC have raised concerns with the Department of Foreign Affairs and Trade (DFAT) about the secrecy surrounding the TPP and its potential impact on Australia's domestic Intellectual Property (IP) regime. More information is available from DFAT's website <http://www.dfat.gov.au/fta/tpp/>

⁹ *Copyright Modernisation Act 2012*

¹⁰ See the comprehensive "Hargreaves report" - I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011)

¹¹ See the USPTO Green Paper *Copyright Policy, Creativity and Innovation in the Digital Economy* (2013) accessible at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>

¹² Australia has been thinking about introducing fair use for a long time. A flexible copyright exception very similar to the ALRC's proposal was first recommended for introduction in Australia in 1998.^[6] The introduction of fair use was recommended by Parliamentary Committees in 2004.^[7] The House of Representatives Inquiry into IT Pricing recently recommended the consideration of fair use for consumers, businesses and educational institutions.^[8]

¹³ The Joint Standing Committee on Treaties—Parliament of Australia, Report 61: The Australia–United States Free Trade Agreement (2004), Rec 17; Senate Committee considering the Australia –United States Free Trade Agreement in Chapter 3 – Intellectual Property at [3.103 – 3.105], available here: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=freetrade_ctte/report/final/ch03.htm; Parliament of Australia, Senate Select Committee on the Free Trade Agreement between Australia and the United States, Final Report, August 2004. See in particular Labor Senators recommendation 8; Cited at footnote 5 in Weatherall, K

Representatives Inquiry into IT pricing recently recommended the consideration of fair use for consumers, businesses and educational institutions¹⁴.

Scope of the Submission

Given the other inquiries and reviews underway, we would expect that copyright reform will shortly be the subject of comprehensive parliamentary deliberation, taking into account all the matters outlined above. As such, we have confined this submission to addressing some of the most crucial aspects raised by this bill, highlighting the need for positive copyright reform. They are as follows

- Recommendations for an flexible, balanced “fair use” copyright exception
- Addressing some of the major concerns most commonly raised in regards to a “fair use” exception
- Highlighting the need further provide for the legitimate circumvention of TPMs and the expansion of safe-harbours.

In addressing fair use, we believe that both the models proposed in this bill and the model proposed by the ALRC would provide significant benefits. After careful consideration we believed the model proposed by ALRC however is most suited to Australian circumstances

Should the Committee wish for any further information, we would be happy to assist, and have included our contact details on page 2 of this submission.

The Case for Fair Use

We believe that copyright should strike a balance between the interests of the creator and public interest in access to knowledge, culture and education. In a digital age, the interests of creators and the public in ensuring appropriate access to works are becoming increasingly aligned.

Of copyright bureaucracies and incoherence: Stepping back from Australia's recent copyright reforms, Melbourne University Law Review, Vol 312007, p976. See also Regulatory Impact Statement to *Copyright Amendment Bill 2006*, p6.

¹⁴ House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT pricing and the Australia tax* (Canberra, July 2013) at xiii.

Exceptions to copyright have not kept pace with society and technology, and they need reform. The ADA's #copywrong website (www.faircopyright.com.au) highlights some of the more ridiculous gaps not covered by our narrow, purposed based exceptions. These include:

- Libraries can make copies of a published work for the purposes of replacing a work...but only **after** that work has been lost or stolen;
- Operating a search engine in Australia risks infringing copyright; and
- You can backup your own email attachments and shared pictures, but not emails and attachments someone else sends to you¹⁵.

Consumer organisation Choice has recently started a "fair use" campaign, highlighting some further anomalies in the current law and urging reform for the benefit of consumers. Issues highlighted include:

- The illegality of storing your legitimately purchased content in the cloud; and
- The fact that you cannot copy legitimately purchased digital videos (including DVDs) onto your iPad for private use¹⁶.

The problems are not new. The narrowness of the fair dealing, time and format shifting, library and archive exceptions mean that new, innovative uses and technology will often fall outside of their confines, and have to be addressed with specific law reform. The replacement of these with a fair use exception, where uses are judged against standard fairness factors, would bring flexibility and balance into Australia's copyright law.

The ALRC proposals

In their recent Discussion Paper the ALRC proposed the adoption of a fair use exception which would include the following list of non-exhaustive fairness factors (substantially similar to those proposed in the Bill) to be considered when judging whether a use was fair.

¹⁵ All examples taken from Australian Digital Alliance #Copywrong www.faircopyright.com.au/

¹⁶ Cartwright, M "Australians are breaking copyright law" *Choice* August 2013 accessible at <http://www.choice.com.au/media-and-news/consumer-news/news/are-you-breaking-the-law.aspx>

- (a) the purpose and character of the use;
- (b) the nature of the copyright material used;
- (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material¹⁷.

In their comprehensive report, the ALRC draw deeply on reports, economic material and the 295 submissions received in response to the issues paper and conclude:

The ALRC has considered the various arguments made for and against the enactment of a fair use exception in Australia and concludes that fair use:

- is suitable for the digital economy and will assist innovation;
- provides a flexible standard;
- is coherent and predictable;
- is suitable for the Australian environment; and
- is consistent with the three-step test¹⁸.

Addressing concerns and Misconceptions about Fair Use

- **Fair use will harm creators**

The fair use proposal, either in the form suggested in the Bill or the form suggested by the ALRC, specifically take into account the impact of any use on the market for the material and the value of the copyright works. If a use unreasonably harms the interests of copyright owners then it will not be fair.

The United States of America, which is the world's largest exporter of copyrighted content, has nurtured its creative industries successfully for decades under a copyright regime that includes the exact same fair use proposal as suggested in this

¹⁷ Australian Law Reform Commission *Discussion Paper – Copyright and the Digital Economy*

¹⁸ Australian Law Reform Commission *Discussion Paper – Copyright and the Digital Economy* at 4.92 <http://www.alrc.gov.au/publications/4-case-fair-use-australia/alrc%E2%80%99s-proposals-reform>

bill. Indeed fair use is acknowledged to work for the interests of creators, with the Motion Picture Association of America (MPAA) recently noting '(o)ur members rely on the fair use doctrine every day when producing their movies and television shows¹⁹'. Additionally we note that fair use is working well in countries such as Canada, Israel, Singapore and South Korea.

Moral rights, which unlike the economic rights of copyright remain with the creator and cannot be sold or transferred, would still protect an author's rights to correct attribution of authorship and right of integrity of authorship²⁰.

- **Fair Use is too Uncertain**

Our experience in Australia is that our current rigid exceptions are uncertain in implementation. The application of the purpose based exceptions to new technologies is often unclear, as we stated in our submission to the ALRC Issues Paper

While Australia's Copyright Act does not expressly prohibit activities such as indexing, searching and caching, the uncertainty created by the lack of exceptions clearly applicable to these activities makes undertaking these activities in Australia highly uncertain relative to comparable jurisdictions and exposes organisations deploying these technologies to uncertain legal risks. This has a negative effect on innovation, particularly innovation based in Australia.²¹

Meanwhile research undertaken for the ALCC on the libraries and archives exception, s200AB, reveals that it has hardly been used by those institutions it was designed to benefit, as those who need to use it do not feel confident in their interpretation.²² Additionally, in the six years since its introduction there has not been one legal challenge, which means that we have no judicial precedent on its application.

¹⁹ Sheffner, B *MPAA and Fair Use: A quick History* (2013) <http://blog.mpa.org/BlogOS/post/2013/04/11/MPAA-and-fair-use-a-quick-history.aspx>

²⁰ Moral rights were introduced into Australian legislation with the *Copyright Amendment (Moral Rights) Act 2000*

²¹ ADA and ALCC *Copyright and the Digital Economy Issues Paper Submission 213*, (2012) p. 12

²² Policy Australia *'Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?'* (October 2012); attached to ADA and ALCC *Copyright and the Digital Economy Issues Paper Submission 213* (2012).

Meanwhile, in the United States, which has the same fair use provision as that proposed in the Bill, a number of studies have concluded that fair use is not inherently uncertain²³, and that ‘the fair use doctrine has a set of core principles and is coherent across particular types of uses or “policy clusters^{24”’.}

With a broad range of international jurisdiction to draw on, as well as the experience of the current research and study fair dealing provision, which incorporates the four fairness factors suggested by the ALRC (similar to the ones proposed in the Bill) fair use would not be too uncertain. Instead it would provide much needed flexibility and adaptability in a predictable way.

TPMs and Safe Harbours

Currently exhaustive, restrictive TPM provisions prevent educational institutions, libraries, archives and consumers from using content in ways recognised as legitimate by Parliament and provided for through copyright exceptions.

As the Copyright Advisory Group (schools and TAFES) outlined in their submission to the ADG review of TPM exceptions²⁵ a number of legitimate uses of content which are being prevented due to TPMs, even though the intended use is non-infringing under copyright law²⁶. Where TPMs are attached, educators cannot:

- Create subtitled versions of films for hearing impaired students
- Use devices other than a DVD player (like iPads, laptops, content management systems) to play protected DVDs in the course of classroom instruction
- Compile film clips and other snippets of content protected by TPMs to aid student analysis or classroom discussion.

²³ P Samuelson, ‘Unbundling Fair Use’ (2009) 77:5 Fordham Law Review 2537, 2618; and M Sag, ‘Predicting Fair Use’, (2012) 73:1 Ohio State Law Journal 76.

²⁴ G Hinze, P Jaszi & M Sag The Fair Use Doctrine in the United States — A Response to the Kernochan Report, (July 2013) p. 4. Available at SSRN: <http://ssrn.com/abstract=2298833>.

²⁵ Attorney General’s Department *Review of Technological Protection Measure Exceptions*
<http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/CurrentIssuesReformsandReviews/Pages/ReviewofTechnologicalProtectionMeasureexceptions.aspx>

²⁶ The Copyright Advisory Group of the Standing Council on School Education and Early Childhood, submission to the Attorney-General’s Department, August 2012
<http://www.ag.gov.au/Consultationsreformsandreviews/Documents/Copyright%20Advisory%20Group%20%28CAG%29%20Submission.PDF>

Even in situations the legislation provides for TPMs to be circumvented or removed, in practice this may be difficult to achieve. For example library staff trying to act under Schedule 10A of the *Copyright Act 1968* in bypassing TPMs may not have the technical expertise or circumvention device to remove locks.

TPMs have also had a significant adverse impact on access to digital content by people with disabilities. As we noted in our submission to the IT Pricing Inquiry²⁷

There is no general exception in the Copyright Act permitting someone with a visual impairment (or intellectual or hearing impairment) to change content into a format they can access if there is a TPM attached. Only institutions assisting persons with a print disability (including educational institutions) may circumvent TPMs for the purposes of educational instruction²⁸. People with disabilities cannot circumvent TPMs in order to access a work for private study, for creative use, for pure enjoyment, even in circumstances where the work is unavailable for purchase in Australia.

In the light of the substantial hurdles already faced by blind and visually impaired people, and following from the recent WIPO Marrakesh treaty, we think that it is essential that there is legislative recognition that blind and visually impaired people, should be allowed to bypass TPMs in order to make accessible copies.

We welcome the renewed attention to safe harbours. As we noted in our Joint submission response to the Attorney-General's Consultation Paper on revising the scope of the safe harbour scheme in the *Copyright Act 1968*, we support the expansion of safe harbours to cover the range of service providers contemplated by the Australia-US Free Trade Agreement (AUSFTA)²⁹. This important reform where Australian online service providers, libraries and educational institutions (and other organisations that offer internet services) do not receive the same protections at law as ISPs and their counterparts in other countries.

²⁷ ADA/ALCC Submission to the IT Pricing Inquiry (2012)
http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/subs.htm

²⁸ Item 3, Schedule 10A *Copyright Regulations 1969* (Cth).

²⁹ ADA and ALCC Submission to Attorney-General's *Consultation Paper on Expansion of Safe Harbours* (2011) accessible here
<http://digital.org.au/our-work/submission/expanding-scope-copyright-safe-harbours>