



Australian Digital Alliance

***Consultation Paper:
Digital Economy Future Directions***

Submission of the
Australian Digital Alliance

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1. About us

This submission is made on behalf of the Australian Digital Alliance (ADA)

We thank the Department of Broadband, Communications and the Digital Economy (DBCDE) for the opportunity to comment on the Consultation Paper “Digital Economy Future Directions” (the **Consultation Paper**).

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, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans across various sectors, all members are united by the common theme that intellectual property laws must strike a balance between providing appropriate incentives for creativity against reasonable and equitable access to knowledge.

2. Outline

The Australian Digital Alliance sees great potential in digital economy, offering significant potential economic, cultural and educational benefits to Australia.

We have addressed below items in the Consultation Paper that are of particular concern to the ADA. In summary:

- we strongly support an open access policy for PSI, including increased access publically funded collections;
- we believe it is necessary to introduce further flexibilities and safeguards into the Copyright Act 1968 (Cth), in order to encourage individuals, institutions and business to engage and fully utilise the potential of the digital economy; and
- we strongly support collection of data and the development of evidence-based policy in this area.

We note that the scope of this Consultation Paper does not extend to any matters relating to the ISP filtering ‘live’ pilot. We therefore have not commented on this issue, however we do wish to note our concerns about the detrimental impact ISP filtering might have on the free flow of information, and in particular, access to online information and resources. The ADA strongly recommends DBCDE provide an opportunity to comment on this issue soon.

3. Open Access to Public Sector Information

As the Consultation Paper notes, the digital age offers increasing potential for the valuable use and reuse of information created by Australian governments.¹ The ADA

¹ Commonwealth Government, *Digital Economy Future Directions Consultation Paper*, 2008, 3.

strongly supports an open access policy for public sector information (PSI) and the flow-on cultural, educational and economic benefits this offers.

An open access policy allows educators to draw freely from the vast resource of public sector information and resources when putting together teaching courses. This might include allowing and encouraging students to use and re-use PSI in novel ways as part of assignments.

In the field of research and development within Universities and elsewhere, an open access policy would allow researchers to freely use, manipulate, compare, and build upon PSI as part of their research.

The ADA believes it is in the public interest to allow broad use and re-use of PSI by individuals and organisations. A recent example of the potential an open access policy offers was seen in Google's mapping of the Victorian bushfires. Google used up-to-date information from the Country Fire Authority of Victoria to produce a map setting out the locations of the bushfires, their severity and other details such as how many fire trucks were in attendance.² However, the map does not include as much information as it potentially could have:

The search giant's search for data to plot fires on public lands — which are managed by the Victorian Department of Sustainability and Environment (DSE) — produced an entirely different result. With no public feed of the fires' location and an explicit denial of permission to access its own internal data, the engineers were ultimately unable to plot that data on the map as well.³

This case study suggests that it is perhaps necessary to have a broad ranging open access policy that includes State and Territory Governments.

The ADA's broad membership includes a number of collecting institutions such as the National Gallery of Australia, the National Film and Sound Archive, National War Memorial and the National Library of Australia. A number of our University members also hold significant collections. We have a particular interest in increasing access to publically-funded cultural, educational and scientific collections. A number of our cultural institutions are pursuing or in the process of pursuing increased access to their collections over the internet via digitisation projects. For example, the National Library of Australia, in collaboration with Australian State and Territory libraries is engaged in the Newspapers Digitisation Project, which makes older Australian newspapers available online, allows text search and incorporates Web 2.0 style functionalities such as allowing users to login and make corrections to errors in computer generated text.⁴ In addition, University libraries play a key part in the development and implementation of open access repositories for theses and academic publications. The ADA supports implementation of a policy to increasing access to the valuable materials held by publicly-funded institutions.

We address below some specific questions in the Consultation Paper:

² Google, Victorian Bushfires Map, available at: <http://mapvisage.appspot.com/fires/FireMap.html>. See also Google Australia's blog entry: <http://google-au.blogspot.com/2009/02/mapping-victorian-fires.html>.

³ David Braue, "Vic Government Limit Google's bushfire map", *ZDNet Australia*, 12 February 2009. Available at: <http://www.zdnet.com.au/news/communications/soa/Vic-Govt-limited-Google-s-bushfire-map/0.130061791.339294916.00.htm>.

⁴ Australian Newspapers beta, available at: <http://ndpbeta.nla.gov.au/ndp/del/home..>

*What categories of Public Sector information are most useful to industry and other stakeholders to enable innovation and promote the digital economy?*⁵

The ADA notes that it is often difficult to predict what particular kinds of information will be most useful. Some information might seem inherently useful, for example mapping data, however, there will inevitably be innovative uses which, for example, combine information from a range of sources to produce something which is wholly unexpected.

Because of the unpredictable nature of ‘innovative’ uses, the ADA believes it is important to open up as much information as possible. The ADA recommends Government develop a policy whereby there is a presumption that all information is appropriate for open access, unless it can be demonstrated that open access is inappropriate. In many cases the PSI will already have been made freely and publicly available, so the only remaining step is to ensure this material available under an open license which allows use and reuse by the public.

*If PSI is made open access, what licensing terms would best facilitate the use of PSI? Should licensing terms distinguish between commercial uses and non-commercial uses and reuses?*⁶

The ADA supports use of the most minimal of Creative Commons licenses, the attribution only, or CC-BY, license. PSI which has been produced using public funds should be made available for use and re-use in as broad terms as is possible. The license need not prohibit commercial use. If Government wishes to encourage novel uses of PSI, and to encourage engagement of Australian business in the digital economy, individuals and organisation must be able to commercialise innovative uses.

4. Ensuring Australia’s regulatory framework enables the digital economy

Does Australia’s copyright law unreasonably inhibit the operation of basic and important internet services? If so, what are the nature of such problems and practical consequences? How should these be overcome?

*Should the existing copyright safe harbour scheme for carriage service providers be broadened?*⁷

It is noted in the Consultation Paper that Australian industries ‘do not have as strong an online presence as their international counterparts’.⁸ The Consultation Paper also queries whether the ‘development of new, primarily user-generated content platforms in Australia, which may host unauthorised content, is impeded by the scope of the “safe harbour” scheme’⁹.

⁵ Commonwealth Government, *Digital Economy Future Directions Consultation Paper*, 2008, 5.

⁶ Ibid.

⁷ Ibid, 18.

⁸ Ibid, 10.

⁹ Ibid, 16.

The ADA believes there is a need for both an extension of the safe harbour scheme, and the introduction of a flexible dealing provision that any individual or organisation can rely upon. This provision could draw from the United States' 'fair use' provision and/or the existing section 200AB.

Flexible dealing provision: Business value

The flexible dealing provision, section 200AB, is likely to enable institutions to increase the services and resources they offer online, for example by enabling increased access to collections in digital form.

The ADA's broad membership includes individuals and organisations who cannot take advantage of the flexibilities offered under section 200AB. Individuals and organisations can access the specific fair dealing provisions. In addition, individuals can access the more recently introduced consumer provisions allowing time-shifting, format-shifting and space-shifting for a 'private and domestic' use. However, there are inevitably innovative and socially, economically or culturally valuable uses that will fall through the cracks of these specific exceptions, with the result that in Australia, innovation may be unduly hindered.

This is particularly the case in the digital environment. The most popular new platforms and social networking sites such as YouTube, Facebook, Flickr and the various Google applications enable user-generated content and the use and re-use of copyright materials from a range of sources. These types of sites are a relatively new, but significant business area in which Australian entrepreneurs and businesses could take part.

However the ADA believes that under the current copyright framework, it is unlikely that the next Flickr, Facebook or Youtube will develop in Australia. In Australia, it is difficult to develop a strong business case for these types of sites and applications when, under Australian copyright law, it is quite likely that the developer will be exposing themselves to liability for copyright infringement or authorisation of infringement. Web 2.0 sites such as Facebook, MySpace, YouTube and Flickr originated in the United States, and these sites were able to develop and flourish because of a copyright regime that includes the flexible 'fair use' provision, in addition to a 'safe harbour' regime that is more expansive than the Australian safe harbour scheme. As noted in the Consultation Paper, there will be times when innovative new sites like these will unintentionally be host to unauthorised content. In addition, for some endeavours, such as the GoogleBooks project, a flexible exception (fair use) was essential to its development.

Flexible dealing provision: Creative and cultural value

The ADA believes that in addition to the potential economic value that a flexible 'fair use' style exception would offer, this provision would also provide cultural and artistic value.

The introduction of the 'fair use for parody and satire' provision at the end of 2006 provided a valuable flexibility allowing social commentary (often humorous) that re-uses and draws upon existing copyright materials. The popular Chairman Rudd

video¹⁰ is a good example of the type of use that arguably falls under this provision. Posted on YouTube during the 2007 federal election campaign, this short production, in the style of a Chinese propaganda film, used parts of old Chinese posters, archival footage, a Mr Sheen advertisement, Tintin comics, Channel Seven Sunrise footage and other recent news footage.

This fair dealing provision provides some scope for Australians to participate in the reuse/remix culture that is so entwined with the digital age and the digital economy. Artists and other creators can rely on this fair dealing provision in certain circumstances, however the obvious limitation is that it must be for the purpose of parody and satire. The re-use of materials solely for artistic purposes cannot be justified under this provision, and there is still no provision in Australia to allow transformative use of copyright materials.

An example of the burden this can place on creators (not to mention the disincentive to create) can be seen in the Australian music outfit the Avalanches, and their debut album *Since I Left You*, released in 2000. The album was entirely composed of samples, including music, 'found sound' and spoken word recordings. Over 900 samples were used to produce this album. The end result was a critically acclaimed, however copyright clearance of this album took almost two years and commentators marvelled that the album was ever released.¹¹ A broad flexible dealing provision could assist creators (of all kinds – not just musicians) who seek use or re-use copyright materials, particularly when the use is transformative, in the production of their new works.

Access to publicly-funded collections and Legal Deposit

The ADA supports the submission of the Australian Libraries Copyright Committee (ALCC), and in particular their recommendation that the legal deposit regime be extended to include collection and preservation of digital and audiovisual materials. We also note the ALCC's comments outlining factors which currently limit the ability of public institutions to make their collections more readily available online in digital format.

Safe Harbour for Intermediaries

The ADA strongly supports extension of the safe harbours scheme in Australia. As we have discussed above, individuals, institutions and businesses potentially have a great deal to contribute to the digital economy, however the current safe harbour scheme only offers protection to "carriage service providers". We recommend the scheme be amended so that it covers "service providers".

¹⁰Hugh Atkin, *Kevin Rudd - Chinese Propaganda Video*, 2007. Available at: <http://www.youtube.com/watch?v=ptccZze7VxQ>.

¹¹ Flagship online music journal Pitchfork stated:

[I]t's pretty incredible that this thing got released in the first place. The fact that they sample everything from long-forgotten R&B records to golf instructionals to Madonna's "Holiday" makes it even more impressive.... But what really makes this album brilliant is not as much the volume or quality of the samples used as the way that they're employed. The Avalanches have managed to build a totally unique context for all these sounds...As a result, *Since I Left You* sounds like nothing else.

Available at: http://www.pitchforkmedia.com/article/record_review/15136-since-i-left-you.

Universities, Institutions, Search Engines and other Service Providers

The current scheme is too narrow in scope as it offers no protection to universities and other institutions providing internet services. It also offers no protection to online service providers such as search engines.

A university, for example, provides an internet service to its students and staff, which includes facilities that could be used to transmit copyright material or otherwise infringe copyright. The large number of people on a university network, and the extremely large volume internet traffic means it is very difficult to completely avoid infringing action by staff or students on the network. However it would certainly be agreed that the provision of an internet service is essential in offering education that is technologically up to date, and includes for example, access to quality resources, class materials, and recorded lectures.

As we mentioned earlier as part of our recommendation for a flexible ‘fair use’ style exception, it is difficult for an Australian organisation or entrepreneur to justify their business case for an online service or application, if they are vulnerable to liability for infringing content on their proposed service. If Australia wishes to optimise conditions for entry into the digital economy, the ADA believes it is necessary to expand the safe harbour scheme.

The US has a broader scheme which provides universities and online service providers with the benefit of a safe harbour. The language of the legislation allows it to continue to develop as technology - and use of the technology - changes. For example, in the recent US case of *Io v. Veoh*¹² Io Group argued that Veoh (a Web 2.0 service similar to YouTube) was disqualified from relying upon the safe harbour scheme because they converted user uploaded content into Flash format. By this action, it was argued that Veoh was directly involved in the storage, and was no longer storing the material “at the Direction of a User”¹³. However, the process of converting to Flash format was an automated process, and it was held that Veoh was still storing the material ‘at the direction of the user’, and so was still able to rely upon the safe harbour scheme.

The ADA recommends expanding Australia’s scheme along the same lines as the US, in technologically neutral terms, replacing “carriage service provider” with “service provider” and amending definitions accordingly. The scheme should be available to:

- a) a person or entity who provides services relating to, or provides connections for, the transmission or routing of data; and
- b) a person who provides or operates facilities for online services or network access.¹⁴

¹² *Io Group, Inc. v. Veoh Networks, Inc.*, No. C06-03926 (N.D. Cal. Aug. 27, 2008)

¹³ *Digital Millennium Copyright Act*, 17 U.S.C. § 512(c)(1).

¹⁴ This recommendation was made by ADA Board Member Kimberlee Weatherall in a submission to the Attorney General’s Department: K Weatherall, *Response to Attorney-General’s Department. Part V Division 2AA of the Copyright Act 1968 (Cth), Limitation on Remedies Available against Carriage Service Providers*, 2005, 3. Available at: <http://www.ipria.org/publications/submissions/KWeatherallSubmission1safeharbour.pdf>.

The ADA also notes that the safe harbour scheme was designed over ten years ago as part of the US's Digital Millennium Copyright Act in 1998. There have obviously been a number of technological developments since this time, as well as changes in usage and services (for example the rise of social networking services). Any examination (and possible amendment) of the current safe harbours scheme should consider these developments, and seek to ensure the scheme is technologically neutral, and flexible enough to keep pace with changes in the online environment.

Anti-Counterfeiting Trade Agreement (ACTA)

The Australian Government is currently participating in the negotiation of the ACTA, a plurilateral agreement spearheaded by the US. The ADA has previously noted concern about the lack of transparency in these negotiations, and our concerns about the possible content.¹⁵ Although there is still scant information on the content of this agreement, the broad aims and scope of the agreement¹⁶ suggest that intermediary liability is likely on the negotiating table. The ADA is concerned that the ACTA will seek to impose higher standards of liability on intermediaries. This would certainly have a dampening effect on Australian businesses and entrepreneurs seeking to participate in the digital economy.

5. Measuring the Digital Economy and its impacts

As noted in the Consultation Paper, the National Innovation System review outlined the need for collection of appropriate data in order to support evidence-based policy development. The ADA strongly supports comprehensive collection of data in this area.

The Australian Institute of Criminology recently commented on this issue in their report *Intellectual property crime and enforcement in Australia*.¹⁷ They found an “inadequacy of current publicly available data, lack of consistent counting rules and differences in methodologies” on the extent of IP infringements and their estimated costs, and recommended more independent research in this area.¹⁸

Commonly, research in this area tends to focus on intellectual property rights, and the economic contribution of those industries relying on intellectual property rights and protections.¹⁹ The ADA is concerned that this kind of research fails to consider the economic contribution of industries and institutions that rely upon the *flexibilities* and exceptions to intellectual property rights, and also fails to consider the costs that too-strong copyright protection can impose on industries. By way of example, the US

¹⁵ *Principles for ACTA Negotiations*, 2008. Available: <http://www.digital.org.au/submission/ACTA.htm>.

¹⁶ *An International Proposal for a Plurilateral Anti-Counterfeiting Trade Agreement (ACTA)*, Department of Foreign Affairs and Trade Website: <http://www.dfat.gov.au/trade/acta/discussion-paper.html>.

¹⁷ Australian Institute of Criminology, *Intellectual property crime and enforcement in Australia* (2008). Available: <http://www.aic.gov.au/publications/rpp/94/>

¹⁸ *Ibid* 69.

¹⁹ See for example, Price Waterhouse Coopers (prepared for the Australian Copyright Council), *The economic contribution of Australia's copyright industries*, 2008. Available at: <http://www.copyright.org.au/policy-research/research/economy>.

Computer and Communicating Industry Association commissioned a report which sought to consider these factors:

Numerous studies have promoted the first half of the copyright equation – the value of copyrighted works, sometimes referred to as the “Copyright Economy” – but have overlooked the second part: the value that the U.S. economy derives from the limits that the Constitution, Congress, and the courts have placed on the rights of copyright holders like ourselves. This study seeks to ascertain the extent of this “Fair Use Economy.”²⁰

The ADA strongly supports the evidence-based policy development in this area, and looks forward to seeing a comprehensive collection of data to shed light on the economic value of all aspects of copyright law, including the flexibilities and exceptions, as well as rights and enforcement.

6. Conclusion

We thank the Department of Broadband, Communications and the Digital Economy for the opportunity to comment on this important area of development.

The ADA sees great potential in the digital economy to provide not only economic benefits, but to enable increased access to information, and educational and cultural benefits.

²⁰ Capital Trade Incorporated (prepared for Computer and Communicating Industry Association) *Economic Contribution of Industries Relying on Fair Use*, 2007. Available at: <http://www.ccianet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf>.