



AUSTRALIAN DIGITAL ALLIANCE

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POSITION STATEMENT: PROPOSED COPYRIGHT REFORMS

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The Australian Digital Alliance (ADA) is a cross-sectoral alliance in favour of copyright laws that balance effective protection of the interests of rights holders against the wider public interest in the advancement of learning, innovation, research and knowledge and in supporting balanced copyright and related laws that advance the interests of society as a whole.

As such, the ADA made detailed submissions to the Government's "Fair use and other copyright exceptions" inquiry initiated in May of 2005 which contended that currently copyright laws, particularly those that embody user interests, are out-dated and ill-placed to appropriately address the interests of consumers, innovators and educational and cultural institutions in the digital environment.

These concerns were accentuated by the copyright law amendments brought about by the Australian – US Free Trade agreement, which significantly strengthened the rights of copyright owners by simultaneously:

- a) Lengthening the term of copyright by 20 years,
- b) Broadening the potential scope of copyright owners' rights, particularly via anti-circumvention laws which risk protecting rights never before protected by copyright, (particularly, the right of access), and;
- c) In relation to this much broader group of works protected, increasing the penalties available against 'infringers'.

It was (and remains) the ADA's position that major reforms indeed are required, not only to address the inadequacies of the current laws and ensure a level of copyright protection that promotes rather than impedes innovation, but in order to ensure that Australia remains globally competitive in the area of innovation.

The Proposed Reforms

In light of this, the ADA welcomes the reforms proposed by the Attorney-General in his media release of 14 May 2006, in relation to amendments regarding an overhaul of the current copyright exceptions to better reflect a balance of interests in the Copyright Act. The ADA is pleased that Australia's previous outdated copyright laws have been remedied to address concerns of specific sectoral interests. Many of the ADA's members will be well-served by the changes, which will help restore the

balance of interests of libraries, educational and cultural institutions as users and copyright owners. This balance has recently moved in favour of owners as a result of developments in digital technology and effective lobbying by owners in various international forums.

At the same time however, the ADA is concerned about the apparent limitations of the reforms, particularly in the area of innovation.

The ADA looks forward to further clarifying any concerns it has when the draft exposure Bill is released, however the ADA herein notes its initial position based on the Attorney-General's media release:

1. Extension of Copyright Exceptions for Libraries and Cultural Institutions

The ADA welcomes the reforms extending the exceptions available to libraries and cultural institutions. The ADA understands that a new exception for national cultural institutions to more effectively preserve and provide public access to items will enable a broad range of institutions holding 'culturally significant' material to undertake better preservation practices and facilitate access to the public of such material.

As such, the reforms will also enable cultural institutions to comply with various statutory requirements as provided for in the enabling legislation establishing many of these institutions.

The ADA notes however that the term 'national cultural institutions' is confusing as it could be interpreted to mean 'Commonwealth cultural institutions'. The ADA understands that this is not in fact the case and emphasises the need for all institutions holding 'culturally significant' material to have access to such an exception (for example, this should include State institutions, public and university libraries, and private collecting institutions).

The ADA understands that the flexible dealing exception will also enable institutions to undertake a broad range of copying for non-commercial purposes, including for example, inclusion of extracts of historical documents in materials for visitors, allowing persons with a print disability to convert a book they own into accessible text, converting out of date VHS material onto DVD format.)

The ADA is concerned that the Berne¹ '3 step test' is intended to be incorporated into Australian legislation. This introduces additional and unnecessary complexity into the Copyright Act. The legal problems the ADA envisages by the inclusion of the '3 step test' in Australian legislation will be addressed in more detail in the near future.

2. Extension of Copyright Exceptions for Educational Institutions

The ADA welcomes the reforms extending the exceptions available to educational institutions and also in relation to uses for the benefit of people with disabilities.

¹ Berne Convention for the Protection of Literary and Artistic Works

These reforms address important functions in educational institutions and will facilitate educational institutions to provide better quality services to students.

The ADA welcomes the Government's intent to clarify the question of caching by education institutions in carrying out their teaching roles, the use of distributed technologies for classroom teaching, and the scope of the communication right. It is an untenable argument that caching should be considered to be a remunerable action under the educational statutory licences. It is an equally untenable argument that merely browsing or accessing copyright material for educational purposes should be considered to be remunerable.

The flexible dealing exception will also enable educational institutions to undertake a broad range of copying for non-commercial purposes, including for example, those mentioned above.

3. New Exceptions for Private Use

The ADA welcomes reforms which will facilitate use of available technologies to enable consumers to enjoy lawfully acquired material. The reforms outlined in the media release will update and improve the status quo by allowing limited copying for private, non-commercial purposes. Particularly, the media release envisages:

- (a) A time-shifting exception which will allow (amongst other possible uses) consumers to record television and radio programs to view or listen to once at a later time; and
- (b) A format-shifting exception which will allow a person who has legitimately acquired a copy of some categories of copyright material, to make a copy in a different format. For example, provided the original was legitimately purchased, individuals will be able to 'format-shift' personal music from CD format to MP3 format, or a newspaper article from print format into a computer file, or VHS cassettes onto DVD format.

The ADA is concerned however with placing undue limitations on such copying, such as 'one use only' and notes recent publications such as '*Copyright Reforms: Dumb and dumber*' (Sydney Morning Herald, 15 May 2006) as an indication that compliance with overly rigid limitations is likely to devalue the workability of the reforms. The ADA suggests a more flexible approach which defines time-shifting by its purpose rather than by the number of uses made of the material.

4. New Flexible Dealing to Include Parody and Satire

The ADA commends the Government for introducing a new fair dealing purpose which will enable creators to create new works which build on works already in existence, within the scope of the law. The ADA believes that this new purpose, which essentially entails a form of transformative use, will enhance innovation.

However, the ADA is concerned that there is a clear absence of any exception for transformative uses more broadly. The ADA is of the view that such a provision

would significantly promote creation of new works by artists, innovators and creators more broadly, in both traditional and new digital formats. The ADA does not see any reason to limit transformative uses to purposes of parody and satire only.

The ADA's Concerns

Whilst the proposed reforms will introduce important reforms that will update current copyright laws and make them more relevant to the current digital environment within which we live, the ADA is concerned that there is a gaping hole in the reforms as they are outlined in the media release. This hole broadly pertains to innovation and new innovative uses. Specifically, the gap covers at least the following and potentially overlapping issues:

1. Operations of Search Engines

The reforms do not address the operations of search engines in copying and indexing publicly accessible websites. Search engines based in the US are able to point to the fair use defence as applied in *Kelly v. Arriba Soft*² to validate their activities. This is not the case in Australia, where the only *potentially* applicable legal argument justifying the legality of these activities is that an implied license applies. Reliance on laws relating to implied licenses however is dubious and leaves the legal status of search engines vague and ambiguous. It does not remove the significant legal risk for search engine operators in Australia in conducting their ordinary activities.

(For more information please see the ADA publication entitled “Copyright Reforms Won’t Cover Innovation”).

2. Transformative uses

The reforms do not address transformative uses more generally. Examples of transformative uses not addressed by the proposed reforms include:

1. Mash-ups & other creative uses

Works which build on the works of others are technically a breach of Australian copyright law and the reforms will not address this except for purposes of parody/satire. This is not the case in the US where transformative uses more broadly are covered by the ‘fair use’ defence.

There will always be a degree of ‘grey’ regarding the point at which something is no longer a copy and becomes a transformative work, however, in Australia, because it is the exclusive right of the rights holder to reproduce a work in ‘material form’, with ‘material form’ requiring ‘a substantial part’ of the work to be copied, transformative uses are consequently included within the scope of the copyright owner’s rights (for example, see the Panel case³). This discourages new and innovative uses. The US fair

² *Kelly v. Arriba Soft Corporation* 280 F.3d 934 (CA9 2002)

³ *TCN Channel Nine Pty Limited v. Network Ten Pty Ltd (No 2)* [2005] FCAFC 53

use exception is considerably broader than the proposed Australian reforms in this respect.

2. Innovative uses

There may be many innovative uses which are not covered by the proposed reforms. One example is the current argument in the US surrounding the 'Google Book Project' whereby Google proposed to scan in-copyright books in their entirety and display 'snippets' via their search engine. This has not yet been deemed by a Court to be 'fair use'. However, crucially, the argument is able to be put before a US Court by Google, which can in turn consider the various aspects of Google's activities, whether they interfere with copyright holders' markets, and whether the value to society of those activities outweighs the value in rigidly applying copyright holders' rights.

3. Operations of Search Engines

This has been discussed above, however is another example of a use which is transformative in nature.

3. Fair Use: Flexibility

In its submissions to the "Fair Use and other copyright exceptions review" the ADA's primary submission argued for a flexible provision to be included in addition to the current fair dealing defences. Such a flexible provision could develop with new technologies and encompass new and innovative uses, such as those described above.

The reforms as outlined in the media release will not introduce such flexibility.

To this extent, the ADA is extremely concerned that the reforms will fail Australian innovators, and will constrain new and innovative uses in the digital environment. The concerns of the ADA expressed above provide cogent examples of this.

Summary

The ADA congratulates the Government on addressing various long-standing concerns of user groups in its proposed reforms. The reforms as suggested will help restore the balance of interests between Australian libraries, educational and cultural institutions and copyright owners, which has moved significantly in favour of owners in recent times.

The ADA is of the view however that the reforms have not gone far enough.

Importantly, the ADA is concerned that the reforms will fail to address the needs of innovators and that copyright law will continue to impede Australia's progress within a globally competitive environment.

The ADA notes that the issues raised herein are based on the Attorney-General's media release of 14 May 2006 only. The ADA looks forward to further clarifying any concerns it has when the draft exposure Bill is released.