



**SUBMISSION TO THE PRODUCTIVITY COMMISSION
INTELLECTUAL PROPERTY ARRANGEMENTS ISSUES PAPER**

20 December 2015

News Corp Australia appreciates to opportunity to make this submission to the Productivity Commission's (the Commission) *Intellectual Property Arrangements* Issues Paper (the Paper).

The Paper spans the breadth of the collection of Australia's intellectual property (IP) rights regimes – patents, copyright, designs, trade marks, plant breeder's rights, circuit layout rights and geographical indications. The Commission is proposing to apply a single principles-based framework across the spectrum of IP regimes. We caution the Commission against taking this approach because while the regimes have some common elements there are also unique and specific aspects of each that should be taken into account.

This submission focuses on copyright. As we have articulated in previous submissions regarding copyright, News Corp Australia strongly believes that the orderly management of copyright is essential to promote the continued production of original copyright materials, ensure sustainable business models and on-going investment and employment in Australia's creative industries.

We believe that Australia's existing copyright framework generally strikes a balance between content creation, consumer choice, and incentives for investment. We also believe that the Act provides an appropriate environment for the evolution of business models within the digital economy.

Changes to the framework would inevitably involve uncertainty which comes at a cost. Changing to a broad fair use exception would include the erosion of the underlying negotiation framework/model which facilitates and enables commercial negotiations to occur, in addition to increasing legal risk and therefore transaction costs for all parties including consumers.

Following is our response to the Paper. We have addressed issues under questions posed regarding copyright in the Paper.

RECENT CHANGES TO THE COPYRIGHT REGIME

In July 2014 the Attorney-General's Department issued the *Online Copyright Infringement Discussion Paper* (the AGD Discussion Paper). That Discussion Paper canvassed three proposals to amend the Copyright Act to provide rights holders with legislative tools to enforce their rights.

The AGD Discussion Paper proposed amendments to the Act to:

1. Clarify the authorisation liability under sections 36 and 101 to ISPs;
2. Extend injunctive relief – to enable rights holders to can seek a no fault order from the courts requiring ISPs to block access to internationally-based websites providing infringing material (similar to that undertaken in other jurisdictions including UK and other European nations, and more recently in Singapore); and
3. Extend the application of the safe harbour scheme from CSPs to service providers for the four categories of relevant activity as set out in sections 116AC, 116AD, 116AE and 116AF of the Act.

Consultation regarding this issue included responses to the Discussion Paper and also a Copyright Forum¹ that included a panel discussion.

The Government pursued only proposal 2 – the amendment to extend injunctive relief. The enabling legislation for which was the *Copyright Amendment (Online Infringement) Bill 2015*². That Bill was the subject of debate in both the House of Representatives and the Senate. The Bill was also the subject of an inquiry by the Senate Legal and Constitutional Affairs Legislation Committee³. The legislation, as passed, is now section 115A of the Copyright Act (the provision is supplied at Appendix A). This has been a successful tool in international jurisdictions to decrease online copyright infringement.

The Government did not pursue proposal 1 (clarify authorisation liability) and proposal 3 (extend the application of safe harbour).

As we articulated in our submission to the Discussion Paper, authorisation liability and the safe harbour provisions are inextricably linked. One does not exist in isolation of the other. This is explored further in this paper.

IS AUSTRALIA'S COPYRIGHT REGIME NOW EFFICIENT AND EFFECTIVE?

As outlined in our submission to the AGD Discussion Paper, News Corp Australia supported an amendment to the authorisation liability provisions of the Act to enable the Act to operate as it was intended.

Importantly, and relevant for the Commission's consideration of copyright in the context of the Paper, the Government's stated goal of that proposal was to provide a legal framework *providing certainty as to legal liability and providing an incentive for market participants to work together*. (emphasis added)

The Government's stated goal is a keystone to the copyright framework. Copyright is a tradeable right. The Paper confirms this (Figure 1: Characteristics of different forms of IP rights). The most recent study of the economic contribution of the copyright industries to Australia by PwC⁴ provides further evidence of this.

¹ <https://www.communications.gov.au/departmental-news/online-copyright-infringement-forum>

² http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5446

³ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Copyright_Bill_2015

⁴ <http://copyright.com.au/wp-content/uploads/2015/08/PWCReport-EconomicContribution-AustraliaCopyright-Industries.pdf>

In 2014 the contribution of the copyright industries to Australia included:

- Employing over 1 million people – 8.7% of the Australian workforce;
- Generated economic value of A\$111.4 billion – the equivalent of 7.1% of GDP; and
- Generated over A\$4.8 billion in exports – the equivalent of 1.8% of total exports.

Unless the framework offers predictability and incentives for market participants to work together – or negotiate – there will be a diminished appetite for investment in creativity, particularly for locally produced content.

THE BALANCE BETWEEN CREATORS AND CONSUMERS IN THE DIGITAL ERA

As we have said in previous submissions regarding copyright, the current copyright framework largely strikes a balance for the digital era.

This is evidenced in the ever evolving products and services available in the marketplace where consumers are the beneficiaries of the existing copyright regime. The current copyright framework enables creators and rights holders to choose the terms on which content is made available.

COPYRIGHT EXEMPTIONS ARE SUFFICIENTLY CLEAR TO GIVE USERS CERTAINTY ABOUT WHETHER THEY ARE LIKELY TO INFRINGE THE RIGHTS OF CREATORS

As we have said in previous submissions regarding copyright, it is our belief that the current copyright framework largely strikes a balance for the digital era. It does so by incorporating clear fair dealing exceptions that are defined by the purpose of the use of the material.

The existing fair dealing exceptions are descriptive of the purpose of use – research or study; criticism or review; parody or satire; reporting news; and a legal practitioner, registered patent attorney or registered trademarks attorney giving professional advice. Considering quotation (for example) without reference to the purpose means that the fairness of the dealing has nothing to be tested against.

Given this, we believe that the exemptions provide an appropriate framework upon which to make decisions.

What the fair dealing exceptions are not designed to do is to eradicate legal risk. However, it should be recognised that the courts are not crowded with copyright litigation claims relating to these matters – whether involving businesses or individual users.

We note that various entities, including but not limited to the Australian Copyright Council and the Copyright Agency offer training, fact sheets and guidance regarding the use of copyright material to businesses, cultural institutions and individual users.

TO BE EFFICIENT AND EFFECTIVE IN THE MODERN ERA, WHAT (IF ANY) CHANGES SHOULD BE MADE TO AUSTRALIA’S COPYRIGHT REGIME?

Consistent with our previous submissions regarding copyright, we do not believe that changes are required.

Fair use

Some claim that Australia requires a broad fair use exception to bring ‘flexibility’ into the regime. We do not believe this is necessary for the following reasons:

- Lack of evidence that it is required in Australia;
- The US doctrine of fair use;
- Fair use would not deliver greater certainty and efficiency – to the contrary;
- Fair use is not a general defence to copyright infringement – nor does it zero-out legal liability;
- Concept is highly subjective;
- Economic benefits are overstated – and don’t take into account costs;
- UK Hargreaves Report – said no to fair use, including not accepting claims that copyright is an inhibitor to innovation; and
- IP is not a show stopper for innovation.

In more detail:

– *Lack of evidence*

As outlined in our submissions to the ALRC inquiry into copyright and the digital economy, there is a lack of evidence to warrant the consideration of introducing a broad fair use exception.

We do not support the introduction of additional exceptions, including a broad fair use exception, on the basis that without substantive evidence of a problem, there is no rationale to introduce such.

Further, if there is evidence of a problem (and we do not say that there is) then the benefits of any change must outweigh the costs of change before progressing.

– *The US doctrine of fair use*

Fair use is a defence to copyright infringement under US law. It provides a defence to copyright infringement for specific actions based on specific facts, on a case-by-case basis. It is not a right.

It is a judicial doctrine that has evolved over almost two centuries in the US, and is supported by case law and judicial precedents. It is also supported by the details and underpinnings that have developed throughout the course of this framework being in place and its application, including the facts of the actual cases tested by the courts.

It is therefore not reasonable to contemplate the introduction of such a doctrine without also importing the content and context of such. This would be challenging at best, and almost certainly would not accord with the foundations and framework of Australian legal practice particularly copyright law.

Lastly, we note that the US Copyright Office’s factsheet regarding obtaining permission⁵ includes this introduction:

Permission is not required for every use of a copyrighted work, and not all unauthorized uses are infringing. But copyright law gives owners of copyrighted works a bundle of exclusive rights, including the right to reproduce their works or authorize others to reproduce them, subject to certain limitations defined in sections 107 through 122 of the copyright law. To determine if a particular use requires permission from a copyright owner, you need to evaluate whether one of these limitations applies to the use. The Copyright Office cannot grant permission to use copyrighted works. In many situations, securing permission is the most certain way to ensure an

⁵ Factsheet M 10, <http://copyright.gov/circs/factsheet.html>

intended use is not an infringement of the copyright owner's rights. For more information about limitations to copyright law, see fl 102, Fair Use.

– *Fair use would not deliver greater certainty and efficiency – to the contrary*

Some argue that fair use provides greater certainty and efficiency. However, as fair use is tested on a case by case basis, this does not hold.

If a broad fair use exception was introduced into Australian copyright law it would need to develop through cases being tested by courts of law.

This would prove costly in time and resources – and would result in increased costs due uncertainty as the laws would continue to be tested. It would therefore also result in erosion of the basis upon which commercial negotiations for use of copyright material occurs.

It would also destabilise and undermine existing commercial arrangements, as well as the assumptions and business cases that product and service innovation is being based on.

Certainty of copyright is a crucial element of investment and re-investment in the creative process. Therefore it also holds that uncertainty, and the risk of uncertainty – to existing business models as well as innovative products and services being developed – is a cost that must be factored into any cost-benefit analysis associated with the introduction of a 'fair use' exception.

– *Fair use is not a general defence to copyright infringement – nor does it zero-out legal liability*

Some are under the misapprehension that fair use is a broad and general defence to copyright infringement – a right – that by extension 'zeros-out' legal risk and there liability.

As outlined above, even within the US context, fair use is not a general defence to copyright infringement.

If fair use were a broad and general defence (a right), it would be the case that there would be massive misappropriation of content – the consequence of which would be that the social and economic benefits derived from originality and creativity would evaporate. This is an untenable situation.

– *Concept is highly subjective*

As above, a broad fair use exception would require testing via litigation over time which would be costly and time consuming.

– *Economic benefits are overstated*

Support for a more flexible copyright regime, such as a broad fair use exception is justified by some on the basis of purported economic benefit.

For example, Lateral Economics for the Australian Digital Alliance claimed a more flexible copyright regime would provide 'additional value'⁶ to the economy, and productivity growth, with 'negligible

⁶ Australian Digital Alliance, *Snapshot, Lateral Economics Copyright Research*, September 2012, p2
<http://digital.org.au/sites/digital.org.au/files/ADA%20-%20Snapshot%20-%20Lateral%20Economics%20Copyright%20Research%20%28Sept%202012%29.pdf>

downside for rights holders'⁷.

Dr George R Barker of the Centre for Law and Economics undertook a critique of the research referenced above. His report, *Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*⁸ (Dr Barker's Report) finds three fundamental weaknesses and flaws with the Lateral Economics analysis:

- Theoretical economic analysis of the costs and benefits of broadening copyright exceptions;
- Empirical analysis; and
- Legal analysis.

These fundamental weaknesses, Dr Barker's report states; '*make the analysis unreliable and its recommendations irrelevant.*'⁹

Dr Barker's report goes on to say:

*'Contrary to the [Lateral Economics] reports economic theory suggests that any weakening in the enforcement of copyright, through introduction of ill defined exceptions and safe harbours of the kind prompted in the [Lateral Economics] reports, would have significant negative economic costs, and little or no benefit*¹⁰.'

– UK Hargreaves Report – no to fair use

The Hargreaves Review in the UK considered fair use and an exception for such, however it did not recommend its introduction.

In announcing the Hargreaves Review in November 2012, UK Prime Minister David Cameron said:

The founders of Google have said they could never have started their company in Britain. The service they provide depends on taking a snapshot of all the content on the internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States. Over there, they have what are called "fair use" provisions, which some people believe gives companies more breathing space to create new products and services.

Given this specific reference to 'fair use' in the announcement of the review, the Hargreaves Report addressed the matter specifically:

*It is equally true, however, that the economic benefits imputed to the availability of Fair Use in the US have sometimes been over stated. When the Review briefly visited Silicon Valley in February, providing the opportunity to meet companies such as Google, Facebook, Yahoo and Yelp, along with investors, bankers, lawyers and academics, a consistent story emerged, namely that Fair Use is (from the viewpoint of high technology companies and their investors) just one aspect of the distinctiveness of the American legal framework on copyright, albeit in the view of most an important part*¹¹.

And:

⁷ Ibid, p2

⁸ Barker, George Robert, *Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*, 26 November 2012, available at SSRN: <http://ssrn.com/abstract=2180769>

⁹ Ibid, p5

¹⁰ Ibid, p5

¹¹ <http://www.ipso.gov.uk/ipreview-finalreport.pdf>, p45, para 5.16

Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law¹².

- *IP is not a show stopper for innovation*

We also note the recent focus on innovation and what is required in Australia to promote such. This has led to many stories in print, TV and digital. We note that IP and copyright do not feature as inhibitors to innovation. We cite two examples here:

- A *Lateline* interview¹³ with Scott Farquhar, co-founder of Atlassian, about how what Australia has to do to rival Silicon Valley; and
- An opinion piece in the *Australian Financial Review*¹⁴ by the previous Minister for Communications regarding the speed bumps to innovation that should be dealt with.

Safe harbour and authorisation – an ecosystem

The safe harbour scheme, at Part V Division 2AA of the Act, was enacted in 2006 following the finalisation of the Australia United States Free Trade Agreement (AUSFTA). It provides incentives for CSPs, in the form of limited liability for authorisation, for cooperating with rights holders in deterring copyright infringement on their networks.¹⁵

Safe harbour and authorisation liability – inextricably linked

Illustrating this with the common image of a set of scales – on one side of the scales would be the benefit (or incentive), and on the other side of the scales would be the obligation. The Act intends for the sides of the scales to be balanced.

If the Act was properly functioning, the benefit to Carriage Service Providers (CSPs) – limited liability (under the safe harbour provisions); would be balanced by CSPs meeting the obligation – cooperating with rights holders to deter copyright infringement (under the authorisation provisions). Thus the safe harbour provisions of the Act are inextricably linked with the authorisation provisions of the Act.

Safe harbour

As detailed in our submission to the AGD Discussion Paper, it is our position that the case for amending safe harbour – expanding the scope from carriage service providers (passive entities) to service providers (commercial entities) – has not been made.

Further, given the inextricable link of authorisation with safe harbour, it cannot be the case that safe harbour is amended in its applicability to service providers without the same occurring to the authorisation provisions.

¹² Ibid, para 5.17

¹³ 23 September 2015, <http://www.abc.net.au/news/2015-09-22/atlassian-founder-scott-farquhar-s-tips-to-rival-silicon-valley/6795236>

¹⁴ Written in January 2014, <http://www.afr.com/opinion/lets-unclog-the-highway-to-hitech-success-20150917-gjolu3>

¹⁵ October 2011, AGD *Revising the Scope of the Copyright 'Safe harbour Scheme'* Consultation Paper, (The Safe Harbour Consultation Paper) <http://www.ag.gov.au/Consultations/Documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme.pdf>, p3

It should also be the case that safe harbour continues to apply only to passive services and is not extended, intentionally or unintentionally, to commercial services. If safe harbour was to apply to commercial services without the counter-balancing authorisation provisions also applying to the same category for a balanced eco-system, the negotiation model of content access would be destabilised and eroded.

Lastly, the safe harbour scheme is contingent on functioning authorisation liability provisions – which is currently not the case.

These are all factors which must be taken into account in undertaking analysis of the benefits and costs of any amendment to the safe harbour provisions.

Authorisation

As we stated in our response to the AGD Discussion Paper, we support an amendment to the authorisation liability provisions of the Act to enable the Act to operate as it was intended.

As the authorisations provisions do not function as intended, the result is the incentives for market participants to negotiate and work together to minimise copyright infringement are undermined.

Injunctions against carriage service providers providing access to online locations outside Australia

- (1) The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that:
 - (a) a carriage service provider provides access to an online location outside Australia; and
 - (b) the online location infringes, or facilitates an infringement of, the copyright; and
 - (c) the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).
- (2) The injunction is to require the carriage service provider to take reasonable steps to disable access to the online location.

Parties

- (3) The parties to an action under subsection (1) are:
 - (a) the owner of the copyright; an
 - (b) the carriage service provider; and
 - (c) the person who operates the online location if, but only if, that person makes an application to be joined as a party to the proceedings.

Service

- (4) The owner of the copyright must notify:
 - (a) the carriage service provider; and
 - (b) the person who operates the online location;

of the making of an application under subsection (1), but the Court may dispense, on such terms as it sees fit, with the notice required to be sent under paragraph (b) if the Court is satisfied that the owner of the copyright is unable, despite reasonable efforts, to determine the identity or address of the person who operates the online location, or to send notices to that person.

Matters to be taken into account

- (5) In determining whether to grant the injunction, the Court may take the following matters into account:
 - (a) the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement, as referred to in paragraph (1)(c);
 - (b) whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;
 - (c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;
 - (d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
 - (e) whether disabling access to the online location is a proportionate response in the circumstances;
 - (f) the impact on any person, or class of persons, likely to be affected by the grant of the injunction;
 - (g) whether it is in the public interest to disable access to the online location;
 - (h) whether the owner of the copyright complied with subsection (4);
 - (i) any other remedies available under this Act;
 - (j) any other matter prescribed by the regulations;
 - (k) any other relevant matter.

Affidavit evidence

- (6) For the purposes of the proceedings, [section 134A](#) (affidavit evidence) applies as if the reference in paragraph 134A(f) to a particular act included a reference to a class of acts.

Rescinding and varying injunctions

(7) The Court may:
(a) limit the duration of; or
(b) upon application, rescind or vary;
an injunction granted under this section.

(8) An application under subsection (7) may be made by:
(a) any of the persons referred to in subsection (3); or
(b) any other person prescribed by the regulations.

Costs

(9) The carriage service provider is not liable for any costs in relation to the proceedings unless the provider enters an appearance and takes part in the proceedings.