



Google Australia’s submission to the Productivity Commission’s Draft report into Intellectual Property Arrangements

Google Australia Pty Ltd (**Google**) congratulates the Productivity Commission (the **Commission**) on its Draft report on Intellectual Property Arrangements, April 2016. Google supports the Commission’s recommendations to:

- replace the current ‘closed’ fair dealing exceptions with a broad ‘open’ and flexible exception for fair use (Draft recommendation 5.3); and
- expand the safe harbour scheme to cover the broader set of online service providers (Draft recommendation 18.1).

Fair use

The draft recommendation

Draft recommendation 5.3, recommends the Australian Government amend the *Copyright Act 1968 (Cth)* (**Copyright Act**) to replace the current fair dealing exceptions with a broad exception for fair use. The recommendation also proposes the provision contain a clause outlining that the objective of the exception is to ensure Australia’s copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement.

Google understands the intent of this additional clause is to make it clear that in the Commission’s view, as a threshold issue, uses of copyright works by third parties that do not impact on the economic value of the works should be permissible under the proposed exception (the **Threshold Test**). We are unclear whether the Threshold Test is to operate independently of fair use or is to be considered a part of the fair use test. In the recent decision of U.S. Supreme Court in *Spokeo Inc v Robins*, 136 S.Ct. 1540 (16 May 2016), the Court held, as a constitutional matter, that for a person to be able to sue for violation of a statutory right, the person suing must show both that they suffered a “concrete and particular harm”. By “concrete” the Court held an injury must actually exist, and not be speculative. For harm to be particularised, it “must affect the plaintiff in a personal and individual way.” While this case has understandably yet to be considered in the context of copyright, requiring persons bringing actions for copyright infringement to show they suffered genuine economic harm given an

economic right is at issue, is consistent with the Commission's recommendation. It is also consistent with earlier jurisprudence.¹

Google further understands that even where some economic harm may arise from a use,² the Commission proposes that the use may still meet the requirements of the proposed fair use exception if the particular use is a fair use based on an assessment of all relevant factors, including the four fairness factors identified by the Commission, namely:

- the effect of the use on the market for the copyright protected work at the time of the use (the **First Fairness Factor**);
- the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work;
- the commercial availability of the work at the time of the infringement; and
- the purpose and character of the use, including whether the use is commercial or private use.

If this is a correct formulation of the Commission's position, Google is supportive of the recommendation, noting that more consideration may need to be given to the precise wording of the fairness factors ultimately included in any legislation and the interaction between the Threshold Test and the First Fairness Factor, which in part covers the same ground.

In any event, if implemented, this exception would ensure that Australia's copyright exceptions remain flexible and capable of being adapted to new technologies and business practices as and when they emerge. In today's digital world, it will also makes copyright laws a core part of Australia's economic and innovation policy, which is essential.

Underpinning many of Google's product successes, including the Google Search and Voice Search, Gmail (spam filter) and Google Translate, is Google's work in machine learning, which is intended to provide intelligent automated assistance for people's everyday life needs, from

¹ In *Authors Guild v. Google, Inc.*, 804 F.3d 202, 228 (2d Cir. 2015) the US Court of Appeals for the Second Circuit noted the connection between the injury-in-fact requirement and fair use, citing the famous 1984 US Supreme Court "Betamax" copyright case, (*Sony Corp.*, 464 U.S. at 453–454), in which the Court concluded that time-shifting using a Betamax is fair use because the copyright owners' "prediction that live television or movie audiences will decrease" was merely "speculative"). Further consideration would need to be given to how such the proposed provision would interact with other provisions in the Copyright Act, which are not concerned with protecting authors / performers from economic harms, such as the moral rights provisions.

² Allowing some market harm from an otherwise fair use is consistent with US fair use case law See e.g., *Authors Guild, Inc. v. Google*, 804 F.3d at 224. In that case the Court recognized that there would be instances in which a searcher's need for access to a text will be satisfied by the snippet view feature, resulting in either the loss of a sale to that searcher, or reduction of demand on libraries for that title, which might have resulted in libraries purchasing additional copies. But the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original. Rather the Court found that there must be a meaningful or significant effect "upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4).

answering general knowledge questions to controlling house systems and helping to complete tasks in a smart home.³ Machine learning is about training a program by example (for example, teaching it to recognise pictures of people by showing the program pictures of people labeled “people”), rather than instructing it line-by-line. Training computers in machine learning requires the use of vast amounts of information, including in the form of text and images. To advance machine learning technology, Google relies on fair use to make the vast number of copies of literary and artistic works required for this process.

The benefits to society that have come from machine learning, which is only in its infancy, are profound. Take Google Translate by way of example. Google Translate now enables more than 100 billion words being translated for free every day for more than 500 million users worldwide, in more than 100 languages. The creation of Google Translate depends on Google’s ability to use machine learning techniques to analyse words in context - millions of words across multiple languages, in context. And that requires making lots and lots of copies of textbooks which are fed into the artificial neural network powering Google Translate, for analysis.

Claims of uncertainty

The Commission noted in the draft report that several participants in this inquiry suggested the introduction of fair use in Australia would give rise to an unacceptable level of uncertainty.⁴ Google does not share those concerns; they do not accord with Google’s own experience operating in countries in which fair use style exceptions exist: not only the United States, but also Canada.⁵ India, as well, has a rich tradition of fair dealing decisions, which sometimes use the term “fair use” interchangeably, and which apply the open, flexible approach found in US decisions.⁶ Israel adopted an explicit fair use statute in 2008, despite fierce opposition from US rights holders, and without any untoward results of which we are aware.

Moreover, as noted in our previous submission, fair use style assessments are common across

³ See Google’s recent announcement for AI and Assist at I/O Conference in May: <http://www.nydailynews.com/news/national/google-o-event-announced-including-google-assist-article-1.2641598>

⁴ Productivity Commission, *Intellectual Property Arrangements*, Draft Report (April 2016), 146 - 147

⁵ See CCH Canadian Ltd. v. Law Society of Upper Canada, [2004], available at: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2125/index.do>; Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), [2012] available at: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9997/index.do>; Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, [2012], available at: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/9996/index.do>.

⁶ See Ayush Sharma, Indian Perspective on Fair Dealing, 14 Journal of Intellectual Property Rights 523 (2009), available at: [http://nopr.niscair.res.in/bitstream/123456789/6706/1/JIPR%2014\(6\)%20523-531.pdf](http://nopr.niscair.res.in/bitstream/123456789/6706/1/JIPR%2014(6)%20523-531.pdf). See also Student Commentary, “Fair Use: Comparing US and Indian Copyright Law, [2012] suggesting differences between US and Indian law are minor, available at: <http://www.jurist.org/datetime/2012/05/sandeep-kanak-rathod-copyright.php>

other areas of law.⁷ And there is nothing about fair use that is inherently more uncertain than those other areas.

Google's product counsels routinely make decisions in relation to the permissibility of new products and product features that require them to consider fair use. This requires them to consider the competing fairness factors,⁸ which are substantially similar to the ones proposed by the Commission and separately the Australian Law Reform Commission.⁹ As with many other legal assessments they make, this requires a careful examination of the factual issues and balancing and weighing of relevant matters having regard to the established legal tests. In the vast majority of cases, Google's product counsels are able to form clear views on whether particular products or features are permissible. Nor is this experience limited to Google: major US media companies routinely rely on fair use without any apparent difficulties, as seen in a thoughtful blog post in 2013 by Ben Sheffner, counsel for the Motion Picture Association of America (**MPAA**). Responding to comments about an MPAA brief submitted in litigation supporting fair use, Mr Sheffner noted:

[W]e do want to push back a bit on the suggestion in some of the commentary about our brief that the MPAA and its members somehow "oppose" fair use, or that our embrace of it in the Baltimore Ravens brief represents a shift in our position. That's simply false, a notion that doesn't survive even a casual encounter with the facts. Our members rely on the fair use doctrine every day when producing their movies and television shows – especially those that involve parody and news and documentary programs. And it's routine for our members to raise fair use – successfully – in court.

...

No thinking person is "for" or "against" fair use in all circumstances. As the Supreme Court and countless others have said, fair use is a flexible doctrine, one that requires a case-by-case examination of the facts, and a careful weighing of all of the statutory factors. Some uses are fair; some aren't.¹⁰ (emphasis added)

The number of cases concerning fair use in which Google has been involved is small, despite the large number of fair use determinations routinely made by Google counsel. Further, the fair use cases in which Google has been involved are precisely those where litigation has served a broad public interest in advancing the law in the face of new technologies.¹¹

⁷ Google Australia Pty Ltd, Submission No 37 to the Productivity Commission, Intellectual Property Arrangements, 15 December 2015, 33.

⁸ 17 U.S.C.A. §107.

⁹ Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2014) 144.

¹⁰ Ben Sheffner, 'MPAA and Fair Use: a quick history' on *Motion Picture Association of America: Policy Focus, an in depth look at policies and positions* (22 October 2013) <<http://www.mpaa.org/mpaa-and-fair-use-a-quick-history/>>

¹¹ See e.g., the Authors Guild litigation, referenced above; *Katz v. Google, Inc.*, 802 F.2d 1178 (11th Cir. 2015)(misuse of copyright in photograph to suppress criticism) *Perfect 10, Inc. v. Amazon & Google*, 508

Not having fair use locks Australian companies out of markets

Of course, not having a fair use exception does not prevent overseas companies from developing and selling goods and services that depend on fair use exceptions for their development in jurisdictions where fair use does not exist. It just stops local companies in those countries from themselves developing those good and services *locally*. So while there have been more than 6 billion translations in Australia using Google Translate¹² over the past 3+ years, with English and Chinese being the top two translated languages, because of Australia's copyright laws it's not something that an Australian company could have created, or for that matter that Google could have created in Australia.

In the digital age, Australian businesses and the Australian economy, more generally, will be at a substantial disadvantage to their overseas counterparts in countries like Israel, the United States, Singapore, the Philippines, the Republic of Korea and Canada if it maintains its closed fair dealing exceptions.

Broadening the safe harbour scheme

The draft recommendation

Draft recommendation 18.1 recommends the expansion of Australia's safe harbour scheme¹³ to cover a broader set of online service providers. Google strongly supports this recommendation and for the reasons outlined in its submission to the issues paper,¹⁴ Google submits the draft recommendation, if enacted, will encourage greater innovative activity online by Australian businesses. In particular, if implemented it will reduce Australia's status as a high risk legal environment for hosting content.

Australian copyright owners are already using safe harbour schemes

The Commission indicated in its draft report that "during inquiry consultations the Commission heard that many online service providers already operated under foreign safe harbour schemes, which were broader than Australia's, such as in the United States, and that as part of their global operations they already provided mechanisms for rights holders to 'take down' infringing content."¹⁵

F.3d 1146 (9th Cir. 2007)(fair use of thumbnails for search engines); *Field v Google Inc.*, 412 F.Supp.2d 1006 (D. Nev. 2006)(caching). The recent jury decision in *Oracle v. Google* dealt with the important issues of APIs, but the fair use component of the case was the remnant of a patent suit and general issues of copyrightability and infringement.

¹² Google Translate is available for free download to Australians on Google Play and the App Store.

¹³ Part V Division 2AA of the Copyright Act.

¹⁴ Google Australia Pty Ltd, Submission No 37 to the Productivity Commission, *Intellectual Property Arrangements*, 15 December 2015, 33 - 35.

¹⁵ Productivity Commission, *Intellectual Property Arrangements Draft Report* (April 2016) 489.

In 2015 Google received requests to remove 558 million Google search results under the Digital Millennium Copyright Act (US safe harbour scheme) from copyright owners around the world, including in Australia. This represented a 60% increase from 2014. Google removed over 98%¹⁶ of these webpages from search results, processing each request on average within 6 hours.

In the last month alone, Google processed requests to remove from search results 85,594,007 web pages across 77,531 websites on behalf of 7,037 copyright owners around the globe including in Australia.¹⁷

The growing number of notices sent to Google by an increasing number of copyright owners and enforcement agents demonstrates the effectiveness and success of the notice-and-takedown system. As the internet continues to grow rapidly, and as new technologies make it cheaper and faster for copyright owners and enforcement agents to detect infringements online, we can expect these numbers to continue to increase. Yet despite this increasing volume, Google continues to improve its ability to receive requests and efficiently remove content faster than ever before.¹⁸

Giving effect to the recommendation

In our view, draft recommendation 18.1 would be achieved with the introduction and passage of the relevant amendments contained in the Exposure Draft *Copyright Amendment (Disability Access and Other Measures) Bill 2016* (the **Exposure Draft Bill**), which was released for public comment on 22 December 2015 by the Department of Communications and the Arts. Google's submission to the Government on the Exposure Draft Bill is included in the Attachment to this submission.

Importantly, the draft recommendation would not only benefit online service providers but would also benefit rights holders by creating a simple system that would provide them with an efficient way to seek the removal of infringing content online and reward online service providers for their collaboration by granting them certain legal protections.

It would also operate to protect the legitimate interests of consumers by providing a process through which they can challenge incorrect claims of copyright infringement. As such, the draft amendments would operate to provide not only legal certainty but also to minimise compliance costs for all participants.

¹⁶ Google declined to remove approximately 10 million webpages from complaints that it determined were incomplete or erroneous claims, including where relevant as a result of receiving a counter notice from a website operator. Google identifies instances where it declines to remove URLs in the column headed "% of URLs not removed" in the Google Transparency Report, which is accessible from the URL www.google.com/transparencyreport/removals/copyright/requests/ (**Google Transparency Report**).

¹⁷ See the Google Transparency Report.

¹⁸ See Information Processing Limited, *Modelling the takedown process*, commissioned by Google, 2015, 2-5.

Authorisation laws remain effective

The Commission noted in the draft report that “[s]everal participants argued in this inquiry that Australia should not extend the protections offered by the safe harbour scheme to additional online service providers until the law around authorisation liability is strengthened.”¹⁹ Google supports the view of the Commission that “the operation of authorisation liability and the coverage of Australia’s safe harbour regime are separate issues.”²⁰ The purpose of the Safe Harbour Scheme is not only discernible from its text and effect, it is expressly set out in sub-s. 116AH(1) of the Copyright Act. That sub-section states:

(1) The purpose of this Division is to limit the remedies that are available against carriage service providers for infringements of copyright that relate to the carrying out of certain online activities by carriage service providers. A carriage service provider must satisfy certain conditions to take advantage of the limitations.

Notably, s. 116AA(2) is as follows:

(2) This Division does not limit the operation of provisions of this Act outside this Division in relation to determining whether copyright has been infringed.

Section 116AA(2) makes it plain that nothing in Div 2AA of Part V can be called in aid to diminish what would otherwise be an infringement of copyright under the Act.

It follows from that provision alone that any expansion of the Safe Harbour Scheme’s protection, for example to service providers other than carriage service providers, cannot have any effect on the law of copyright infringement generally, and in particular on the scope of infringement by authorisation.

The purpose of the Safe Harbour Scheme is to set out a code of behaviour that, if followed, protects those types of entities to whom it is available, and who meet its requirements, against remedies otherwise available for copyright infringement. The protection that it affords means that an eligible service provider need not worry about the law of authorisation and its conceivable varying reach as developed in the cases: if the Safe Harbour Scheme’s conditions are met, the service provider can rest easy. This is entirely appropriate in the online environment where millions and even billions of users may be using the platforms provided by businesses.

Accordingly, if the Safe Harbour Scheme strikes a fair balance, and if a provider meets its side

¹⁹ Productivity Commission, *Intellectual Property Arrangements Draft Report* (April 2016) 488.

²⁰ Productivity Commission, *Intellectual Property Arrangements Draft Report* (April 2016) 490.

of the bargain, persons issuing takedown notices must reasonably accept that their remedies are properly limited.

Further, and in any event, in Google's view the authorisation provisions in the Copyright Act remain effective. There is no suggestion in the decision of the High Court in *Roadshow Films Pty Ltd & Ors v iiNet Ltd*²¹ (**iiNet**) for example that either of the decisions in *Universal Music Australia Pty Ltd and Others v Sharman License Holdings Ltd and Others*²² or *Universal Music Australia Pty Ltd v Cooper*²³ (being the two other main cases concerning online authorisation infringement) would be decided differently if they were determined today.

As the history of Australia's authorisation laws (discussed in *WEA v Hanimex*²⁴, and iiNet) shows, as a statutory tort they have provided copyright owners with remedies superior to those offered by the common law. This is supported by academic commentary which has shown that they are also superior both in wording and application to similar provisions in the UK, Canada and New Zealand.²⁵

Conclusion

Google again commends the Commission on this comprehensive and thoughtful report.

Australian Internet regulation in general, and copyright laws in particular, must develop in line with international best practice in order to be conducive to innovation, the creation of new online Business models and economic growth. Introducing a fair use exception and expanding the Safe Harbour Scheme are central to achieving those goals.

Implementing these draft recommendations are critical to Australia's digital future.

²¹ (2012) 248 CLR 42.

²² (2005) 220 ALR 1.

²³ (2006) 156 FCR 380.

²⁴ (1987) 17 FCR 274.

²⁵ See Dr Giblin's paper *Authorisation in context – Potential consequences of the proposed amendments to Australian secondary liability law*, commissioned by the Australian Digital Alliance, August 2014, 17 -19.

Attachment