



AUSTRALIAN
COPYRIGHT
COUNCIL



***Response to Digital Economy Future
Directions Consultation Paper***

February 2009

About the Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Commonwealth Government's arts funding and advisory body. The Copyright Council provides information about copyright via its website, publications and training, provides free legal advice about copyright (principally to creators and arts organisations), conducts research, and represents the interests of creators and other copyright owners in relation to policy issues.
2. There are 23 organisations affiliated with the Copyright Council, each of which has members who are creators and/or owners of copyright material. Some of these organisations have made separate responses to the Digital Economy Future Directions Consultation Paper (the Consultation Paper).

Introduction

3. The development of the digital economy is dependent on content. Much of that content is protected by copyright, and is produced as result of the incentives provided by copyright law.
4. There are many risks associated with producing digital content, and in particular with disseminating it online. These risks result from a range of factors, including the ease with which digital content can be illegally copied and disseminated, and consumer ignorance about which uses of content are legal and which not.
5. To be confident about making their content available online, content owners need an effective copyright law, but also need consumers to be aware of what they can and can't do with the content, and cooperation from intermediaries such as carriage service providers.

Open Access to Public Sector Information

“Open access”

6. The Consultation Paper does not say what it means by “open access”, but the term is usually used in the context of online publishing to mean that anyone can read or view the material, and to *re-use* the material, without payment.
7. From a policy perspective, it is useful to consider each element separately:
 - whether the material should be available for anyone to view (and therefore learn about the information or ideas conveyed);
 - whether people should be able to re-use the material and, if so, on what terms, having regard to the purpose of allowing the re-use (e.g. to enable innovative products that build on the material), and

- whether viewing and/or free use should be allowed without payment (again, having regard to the objective of allowing viewing and/or re-use, the value of the material, and to whether the producer of the material could use licence fees for the production of new material).

Distinguishing data or information from copyright content

8. According to the Consultation paper, Public Sector Information (PSI):
 - ... includes Government produced data (such as Australian Bureau of Statistics (ABS) and geospatial data) and copyright protected materials (such as reports and other documentation). It can also include materials that result from publicly-funded cultural, educational and scientific activities.
9. It is useful to distinguish access to information from copying or disseminating copyright content that may contain information.
10. Copyright does not protect information or ideas. It protects the way information is expressed or described – for example, in a document, a diagram or a film. Anyone can use another person's information or ideas without infringing copyright, and anyone can produce something new based on another person's information or ideas. Copyright only comes into play if someone wants to copy or disseminate another person's document, diagram, film etc.
11. The public policy issues relating to access to government-produced data, such as ABS or geospatial data, are different to those relating to use of publicly funded copyright content such as television programs produced by ABC or SBS, or artistic works funded by the Australia Council.
12. One of the differences is that income from copyright content can be used by cultural and other organisations to produce new content.

Objectives of open access

13. The Consultation Paper refers to the Powerhouse Museum and the State Library of NSW having recently placed photographs (in which copyright has expired) from their collections onto the US website Flickr. Flickr generates revenue, through advertising, for its US owner, Yahoo.
14. Making the photographs available on Flickr may be one way of achieving certain objectives of the Powerhouse Museum and other publicly-funded collections. These objectives may include:
 - allowing members of the public, including those from overseas, to view items in the collection, and
 - collecting more information about items in the collection (by inviting members of the public to contribute information about the photographs).
15. When considering the success of this project, however, the generation of revenue that does not come back to the collecting institutions to further their activities must be taken into account. That must be weighed against factors such as the numbers of people who view the items online, whether those are the people the collecting institution wants to reach, and the quantity and relevance to the collecting institutions of the information about the photographs contributed by Flickr users.

Ownership of copyright by governments

16. The Commonwealth, State and Territory governments are in a privileged position in relation to ownership of copyright. Copyright in anything made under the direction or control of, or first published by, a Commonwealth or State government department or entity is owned by the government unless an agreement to the contrary has been negotiated.
17. Reports from two inquiries have recommended that the provisions that give preferential treatment to governments in relation to ownership of copyright be repealed: *Review of Intellectual Property Legislation under the Competition Principles Agreement* in 2000, and the Copyright Law Review Committee (CLRC) report on *Crown Copyright* in 2005.
18. The CLRC report also recommended that there be no copyright in certain types of government documents, including legislation, judgments and reports of statutory inquiries. The CLRC recognised that there were many different types of material in which governments may own copyright, and many different types of uses that may be made of it. The CLRC recommended that copyright be centrally managed by each government, and that the management of copyright be uniform.
19. To date, there has not been a government response to the CLRC report.

If PSI is made open access, what licensing terms would best facilitate and promote its use and reuse?

20. We note that the UK Office of Public Sector information (OPSI) offers different types of licences depending on the nature of the information, who owns copyright in it (if it is protected by copyright), the type of use, and whether or not the use will add value. The analysis and approaches taken by OPSI may be a useful starting point for the consideration of access to public sector information in Australia.
21. It is often assumed that allowing free use of PSI will necessarily result in innovation. However, allowing unconditional free use may mean that the information or content is consumed without the production of anything new that benefits society.
22. Where it is appropriate to allow free use of PSI, and the objective of allowing free use is to promote innovation, then there should be an express condition that the information is used to produce something new that benefits society.

Ensuring Australia's regulatory framework enables the digital economy

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

23. The Attorney-General's Department online Fact Sheet, *Limitations on remedies for copyright infringement against carriage service providers* (March 2005), says the purpose of the safe harbour provisions is to provide:

- legal incentives for CSPs to cooperate with copyright owners in deterring the infringement of copyright, and
 - limitations on the scope of remedies available against CSPs for copyright infringements that they do not control, initiate, or direct, and that take place through their systems or networks.¹
24. Unfortunately, those incentives have not resulted in the cooperation envisaged.
25. The safe harbour provisions refer to an industry code. So do the factors in sections 36(1A) and 100(1A) for determining whether a carriage service provider (or anyone else) has authorised an infringement.
26. In May 2005, the Internet Industry Association (IIA) announced that it was finalising its Copyright Code, which would “provide guidance to industry and Australian courts on matters relating to so-called ‘authorisation liability’, or the liability of carriage service providers resulting from the acts of their customers”.² That code has not, however, been finalised.
27. Given that the provisions are not operating as intended, it is not appropriate to broaden them. Given that the incentive to produce an industry code has not been successful, alternatives means of setting the standards envisaged for the code must now be considered.
28. We note the comment in the Consultation Paper that:
- It is not clear whether the development of these new, primarily user-generated content platforms in Australia, which may host unauthorised content, is impeded by the scope of the present ‘safe harbour’ scheme
29. Having regard to the purpose of the safe harbour provisions as described above, they are not appropriate for sites that enable subscribers to upload user-generated content. In many cases the organisations that run these sites are earning income, for example via advertising revenue, as a result of the content that is uploaded by subscribers. They have a direct legal relationship with the subscribers who upload content, that enable them to impose conditions relating to the legality of uploaded content.
30. These sites may well have socially desirable functions. However, we dispute that they are analogous to carriage service providers. They are publishers and, like any other publisher, they need to take steps to ensure that the material they publish is legal. Those steps include educating and seeking undertakings from their subscribers, and making arrangements with copyright licensing organisations.

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?

31. The Consultation Paper says:

1

www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Limitationsonremediesforcopyrightinfringementaginstcarriageserviceproviders-Factsheet-March2005 (visited 13 February 2009)

2

News release, 19 May 2005.

... some technology companies suggest existing copyright law may not provide for particular internet services that are important for the digital economy.

32. It is difficult to respond without any details about what these companies say is not “provided for” by the copyright law. We would appreciate an opportunity to respond if that detail is provided.
33. In any event, copyright law does not unreasonably inhibit the operation of basic and important internet services. The purpose of copyright is to encourage the creation and dissemination of new content. Part of the incentive is being able to determine how, and the terms on which, the content is used and disseminated. People who want to use other people’s content as part of their internet service need to deal with the content creators. That is not unreasonable.

Measuring the digital economy and its impacts

34. In 2008, the Australian Copyright Council published a report commissioned from PricewaterhouseCoopers on the contribution to the economy of Australia's copyright industries. The report can be downloaded at www.copyright.org.au/economy. The report’s findings include that in 2006/2007 Australia’s copyright industries:
- employed more than 837,000 people (8 percent of the nation’s workforce) – up 21 percent since 1996;
 - generated \$97.7 billion in economic activity (10.3 percent of GDP) – up 66 percent since 1996; and
 - accounted for \$6.8 billion in exports (4.1 percent of all exports) – up 6.3 percent since 1996.
35. The report is available for download from www.copyright.org.au/economy.