

Submission:

Fair Use and Other Copyright Exceptions

*An examination of fair use, fair dealings and other exceptions
in the digital age*

Submission made by:

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Introduction

This submission lays out a response to the Issues Paper entitled “Fair Use and other Copyright Exceptions: An examination of fair use, fair dealings and other exceptions in the digital age”. The principle of “fair use”, which allows consumers of copyrighted material to use it in any reasonable way that does not harm copyright holders, is an equitable and reasonable one. As the rate of technological innovation in society increases, this issue will become more and more relevant.

This submission is structured as follows. First, a general discussion of the issues will take place. This will be followed by a series of recommendations. Finally, a conclusion will be made, very briefly summarising key recommendations of this submission.

General Discussion

With every major technological innovation that affects the distribution of copyrighted material, there has been created an imbalance between the disparate demands of copyright holders and those that consume the content they produce. From the introduction of the mass printing press hundreds of years ago, to the introduction of the VCR much more recently, copyright holders have, at the introduction of each of these new technologies, attempted to restrict how their content can be consumed and used. However, as the Issue Paper notes in point 2.8, “copyrights owners, after initial alarm, [have] often found ways to exploit the technologies that generated new sources of income and even increased market size overall.” This has always been the way, with copyright holders forced to adapt their business models to reflect changes in technology. This has been driven by the fact that as consumers have been exposed to new technology, they have used copyrighted materials in new and unforeseen ways. As the rate of technological innovation has accelerated, the ebb-and-flow between creators and consumers has accelerated also. During these flux periods, copyright holders often experience a short-term period of transitional pain, but they have invariably come out of each period better positioned than ever before (for example, despite the spectre of internet-based piracy, the Australian Record Industry Association recently surpassed 50 million albums sold in a year for the first time¹).

The initial impetus for the creation of copyright laws was to reward content creators for the effort involved in creating that work, and in doing so, encourage them to create more work. However, those that created copyright laws could not have foreseen how powerful certain copyright holders would become in the future. According to opensecrets.org, content creators or those that represent them such as the Recording Industry Association of America or the Motion Picture Association of America are the leading donors of funds to congressional representatives in the United States of America, and have massive influence over the creation of laws that relate to copyright. With the US being at the forefront of worldwide copyright law, many laws that are created there filter down to other countries – for example, copyright played a large part (in fact, an entire chapter) of the recent Australia/US Free Trade Agreement. What this has meant is that for the past twenty years, creation of copyright law has focused on the interests of copyright holders with very little or no regard to those that consume copyrighted materials. Copyright lengths have been extended numerous times worldwide, with virtually every extension initiated in the US. New and incredibly powerful laws that have the potential to overturn what few rights consumers have with regard to

¹ <http://www.smh.com.au/articles/2004/03/28/1080412234274.html>

copyright have been introduced – most notably, the Digital Millennium Copyright Act, which has since had key tenets adopted in Australia through the Australia/US Free Trade Agreement. All the while, those seeking to restrict copyright and extend copyright terms have continued to benefit from the body of work in the public domain, without actually putting anything back.

I believe that this call for submission presents an important opportunity to reverse this trend (at least within Australia) and codify some rights for those that are equally important in the copyright debate. These are the consumers of copyrighted material, who are often left voiceless simply because they are fragmented and without the resources of the copyright holders. This submission revolves around one key principle – that once a consumer has paid for a piece of copyrighted material, they should be allowed to use it in any way that they wish that does not cause harm to the copyright holder. This is not an unreasonable principle, yet it seems the strength of copyright holders today has meant that it is one that is becoming more and more marginalised.

This principle of allowing consumers to use what they have purchased in any way they see fit (that does not harm others, including the producer) is one that exists within virtually every other area where consumers and producers interact. For example, imagine the outcry that would be created if a car manufacturer sold a vehicle on the proviso that the consumer abided by a list of ways in which it was acceptable for the consumer to use the vehicle. Allow me to carry this analogy further – perhaps the list of restrictions might contain provisos such that the consumer could not carry other passengers, or that the consumer could not use the vehicle to drive in certain regions. If such provisions were adopted, and consumers wished to overcome each of the various restrictions that the manufacturers imposed upon them, then consumers would have to purchase more and more vehicles to allow them to conduct all the activities they wished to do; perhaps being forced to use different cars for different areas, and overall purchase more cars to carry the same number of people. Manufacturers might support this because it would appear, *prima facie*, to lead to an increase in car sales. Whilst this situation sounds ludicrous, it is very similar to the environment that presently exists in copyright law. Under the pretext of protecting unauthorised distribution of copyrighted materials, more and more restrictions have been placed on consumers and how they can (and more often, cannot) use the copyrighted materials they have purchased or otherwise legally obtained.

The principle of allowing a consumer to use a piece of copyright in any way they wish that does not harm the copyright holder is the fundamental idea behind fair use. Time shifting, format shifting, and so on, does not in any way harm a copyright holder. The content has already been sold or broadcast to the consumer; whatever it was the copyright holder has required the consumer to do to take possession of the material has already been done. The only possible reason why preventing such uses of copyrighted material (e.g. time-shifting, format-shifting, etc) is to allow the copyright holder to take “two bites of the cherry”. In the case of copyrighted audio material, instead of a consumer paying for a CD and being able to listen to the music contained on the CD in any way that he or she wishes (be it on an iPod, a CD player, a computer, or so on), the content holder wants the consumer to pay for every different format that the consumer listens to the audio through. If the consumer wishes to listen copyrighted material on a CD, on an iPod, and on an audio cassette, in the absence of fair use provisions the copyright holder is legally entitled to receive payment for copyrighted materials in each of these formats. If the principle behind copyright is that copyright holder is allowing a consumer to use the material contained on the medium, then once a copyrighted is work licensed for use how the consumer chooses to use it should not be of any relevance to the copyright holder – barring, of course actions, that may cause harm to the copyright holder. By not allowing fair use principles such as format shifting, it is in effect obstructing the consumer from legally using the copyrighted material that they have purchased in the way that they wish, and should the consumer choose to use the copyrighted material in a way different to how it was initially supplied, the copyright holder is able to derive profits not only for the first time the copyrighted work is supplied, but to do so again and again for all possible ways that the consumer wishes to use the copyrighted material. If the idea of copyright is to allow a consumer to use a piece of copyrighted material, then whether the consumer chooses to listen to it on a CD player, an iPod, or on a tape deck should not be the concern of the copyright holder any more than an artist should be given some legal authority to dictate where a painting they have sold is to be hung.

Furthermore, by allowing copyright holders to profit on the distribution of copyrighted material in each medium it is sold encourages inefficient distribution of copyrighted material. If, for example, it is cheaper to distribute a song online than sell through a CD store, then market forces will dictate that consumers will purchase in the medium with the lowest cost. If format shifting is not allowed, then producers have no incentive to switch to lower cost methods of distribution – consumers will not just purchase the song at an online store for their iPod, but will be forced to purchase the song again at a CD store if they wish to play it on their CD player. Should format-shifting be allowed, it would put the CD stores in direct competition

with the online stores, facilitating competition which a free market economy aims to foster. Anything less only allows content creators to extract more profit without providing any extra value to consumers of copyrighted materials; in effect, creating artificial monopolies for each medium.

Whilst the issues paper notes that copyright holders have an incentive to meet user expectations (point 2.10), there are certain factors that have emerged recently that have made copyright holders much less responsive in doing so. Copyright holders have in increasing numbers conglomerated, with major record labels and movie studios merging numerous times in the past two decades. This has meant that whereas previously there was a relatively high level of competition in providing copyrighted works, competition has been reduced. Even more concerning is the fact that copyright holders have formed effective cartels (represented most famously overseas by the Recording Industry Association of America and the Motion Picture Association of America; locally by the Australian Record Industry Association). These cartels have meant that when requesting changes to copyright laws, or changing their offering to consumers, they have presented a united front. As basic economic theory argues, when dealing with a monopolistic or oligopolistic entity, the market fails. It is for this reason that it will be insufficient to leave the market to decide; market failure is inevitable due to the self-organising nature of copyright holders. Regulation needs to be put in place to balance the rights of copyright users against those of the copyright holders.

Recommendations

In terms of the possible issues to be considered by submissions, I believe a hybrid of options 1, 2, and 3 should be adopted. Most importantly, a “fair use” or “open-ended” provision should be adopted by Australia. This would allow reasonable uses of copyrighted material to occur without the risk of civil or criminal sanctions being brought to bear on users of copyright. As the medium by which copyrighted works will be used will continue to evolve as long as technology continues to, the legislation will be out of date almost as soon as it is created. Limiting “fair dealings” to specific uses will mean that those users of copyrighted material who use new or innovative ways of consuming content will be at risk of legal action until the legislation is updated. Ensuring that an open-ended provision or fair use provision is adopted would mean that new methods of content consumption are allowed before specific legislation is enacted to cover them.

However, the issues paper makes an important point that those prosecuting for potential breach of copyright are often large corporations with enough resources to be able to support massive and contracted lawsuits. Often, the parties defending such suits do not have access to such a body of resources. Accordingly, at worst defendants will not have the ability to defend themselves at all, or at best defend themselves poorly; resulting in legal precedents that will strongly favour copyright holders. For this reason, in addition to providing open-ended provisions or a fair use provision, the Australian legislature should also retain the current fair dealing exceptions and add further specific exceptions. That these specific exceptions would be created would build certainty for copyright holders and consumers, and could focus on allowing common consumer practices that do not create significant harm to copyright owners to be precisely laid out in law without necessarily being defined by the courts.

The types of exceptions I would strongly endorse for inclusion as being specifically listed include those of time-shifting and format-shifting. These should be allowed under all circumstances for non-commercial use, and in commercial use where time-shifting and format-shifting would not cause significant harm to copyright holders. I would also extend a specific provision allowing “content-shifting” of copyrighted material to the same format under certain circumstances. As an example of this, the common consumer practice of making “mix tapes” or “mix CDs”, where a consumer burns all their favourite songs onto a CD. None of these practices causes significant harm to copyright owners, and again, it is entirely reasonable that a consumer who has already paid for the copyright material be able to consume it in any way in which

he or she sees fit. Furthermore, allowing format-shifting enables technological innovation to take place without the need for copyright holders to “keep up” by providing content in every new technological medium that is invented. For example, if consumers were only allowed to fill iPods with music purchased as MP3s from copyright holders, it is my strong belief that there would be no iPods or equivalent in use today. Instead, because consumers could take previously purchased copyrighted material and shift the content into a format compatible with the new technology, innovation could occur independent of the present format content creators were distributing their content in. An important aspect to note about format shifting is that it must be allowed with at least the same quality as the original format, assuming this is technologically possible. Should format shifting not be allowed without guaranteed quality parity, copyright holders will simply seek to overturn format-shifting by stealth, making the resulting format shifted content so inferior in quality to the original that it would force the consumer to repurchase the copyrighted material.

Furthermore, I would strongly endorse allowing consumers to make backups of all copyrighted material in all circumstances. Consumers are paying primarily for access to the copyrighted material, as opposed to the medium on which it is distributed – i.e. the basis for a consumer having to pay \$30 for an audio CD (when a blank CD can be purchased for less than \$1) is not because of the value of the physical CD, but rather due to the contents of the CD. The copyrighted material is what is valued by the marketplace, the consumer and the producer of the copyright. This accounts for almost all of the additional price on top of the physical goods. Unless copyright holders are willing to replace all lost and damaged copyrighted materials at cost price (which is unlikely to happen, due to the cost of such a scheme and also their foregone revenue) then consumers should be allowed in every case to make a backup of copyrighted material. This will mean that if the physical medium (which is not the valuable component of copyrighted material) is lost or stolen, then consumers will still retain the component of most value – the copyrighted material – that they have paid for, and have legally licensed. The license should be in no way tied to the physical medium. As always, the medium through which copyrighted material is distributed has the potential to be lost or damaged (audio CDs, DVDs, so on) or corrupted (digital music files, software). Backups allow consumers to mitigate the risk of this happening, without placing any additional cost on the holders of copyright. Preventing this from happening seriously damages the rights of consumers by forcing them to repurchase copyrighted material, and provides unreasonable benefits for copyright holders by allowing them to receive payment for multiple instances of consumption of the same piece of copyrighted material.

I would endorse exceptions that allow the use of copyrighted material that has become “orphaned”, and also in the use of parodies. It would be a terrible shame for human creativity to go to waste because the creator of the copyrighted work is difficult or impossible to find. Parodies of copyrighted work, which also encourages human creativity and can add to informed debate on a range of subjects, is another very reasonable exception to copyright restrictions.

Finally, and possibly most importantly, I would support a provision that allows the exceptions such as backups, time-shifting, format-shifting, and fair use/open-ended fair dealings provisions, to overrule any technological protection restrictions. Should such a provision not be adopted, the balance between copyright holders and copyright consumers will be tipped in the favour of copyright holders to such an extent that in the future, it may risk breaking the copyright system altogether. Future technological innovation would be seriously threatened; for example, had CDs had a technological measure incorporated into them when they were developed, under a Digital Millennium Copyright Act (DMCA)-type law it would have been legally impossible to transfer their contents onto a computer – the software that extracts the contents of a music CD to transfer to an iPod would have been illegal to create, market and sell in Australia. It would be likely that as a result, the iPod would not exist, as there would have been no content that could have been legally placed onto it. Similarly, technological protection restrictions will prevent the creation of a video-equivalent to the iPod, simply because movie DVDs all have encryption built into them – and as it would be illegal for a consumer to circumvent the encryption, there would be no way to populate such a device with copyrighted material. That the technology defending the copyright has been cracked (and with it, DVDs have been turned into the video equivalent of CDs) makes no difference – any DMCA-type law, enacted at the behest of copyright holders, attempts to put the genie back in the bottle, preventing consumers from using the copyrighted material they have paid for in the way that they see fit. The copyright holders are throwing the baby out with the bathwater.

Furthermore, as it would be illegal to circumvent technological protection measures (or make or deal in devices that allow circumvention), virtually every one of the proposed amendments to the copyright law raised in the submission paper would be rendered moot. Format shifting, time shifting, fair use, backups, and so on would not be allowed, meaning that copyright holders would be able to profit from selling the same piece of copyrighted material in different formats. This provision of preventing copyright users from circumventing technological protection measures in fair use situations strikes at the very heart of copyright

laws. It is so unreasonable that should all copyrighted material be technologically protected in the future, the incentive for consumers to disregard copyright law in its entirety will far surpass what is currently the case. Would a consumer think it reasonable to purchase the same song to play on their iPod, on their CD player, on their tape player, and so on, each time paying the same price again? By its very nature, preventing the circumvention of technological protection measures would encourage content creators to fragment standards; in a worst-case scenario, many standards would be created in different areas to force consumers to purchase the same copyrighted material for each format. For example, different car manufacturers would each support different playback standards for music in their vehicles. Different countries would do the same. Whilst this sounds like a large leap into a dystopian future, it has already begun to occur today – with movie DVDs. Copyright holders have forced various DVD region-encoding schemes to be enacted by DVD manufacturers, so that DVDs purchased in a country will only play in DVD players from that same country. Whilst presently a consumer can have their DVD player “chipped” to play DVDs from all regions, under a DMCA-style law this will not be legally possible. Not only does this limit international free trade, it would mean that should a consumer wish to play a DVD in Australia that they had lawfully purchased (say) in the United States, they have two choices – either break the anti-circumvention law, or purchase the DVD again. Should consumers be faced with this reality, I predict that rather than obey copyright law, consumers will disregard the law entirely and break the anti-circumvention rule. The demand for such services will become so great that any criminal and civil sanctions enacted by laws such as the Digital Millennium Copyright Act and its derivative to be adopted by Australia through the Free Trade Agreement would not be enough to prevent the illicit services from being offered. Indeed, despite the Digital Millennium Copyright Act being enacted in the United States, services offering to crack the region schemes of DVD-players are still widely available. When viewed in the context of simply allowing consumers to view copyrighted material that they have legally purchased, the importance of fair use over-riding technological protections becomes obvious.

I cannot overstate the importance of ensuring that whatever provisions are enacted by the Australian Government in amending the copyright laws to balance the rights of consumers against those of copyright owners, that these amendments take precedence over laws against preventing technological circumvention. Should this not happen, the result will be the acceleration of the adoption of technological protection schemes for all copyrighted materials in Australia, as it would allow copyright holders to bypass fair use measures. This would in effect overturn whatever consumer rights are introduced by the result of this issues paper, and in turn, either the effective cost of copyrighted material will go up to such a level that it

will become unaffordable (by in effect giving copyright holders instant monopoly status on the distribution of their works), or, more likely, it will result in a mass consumer revolt with the consumers completely disregarding copyright law altogether. As already discussed, this would dramatically increase the level of demand for services that allow circumvention of technological protection measures, to such an extent that the criminal and civil sanctions protecting copyrighted works would no longer be effective.

Regardless of which of these two possible situations come to pass, should a technological protection bill be introduced, a massive increase in illicit trade of copyrighted materials will result. This is already happening with the introduction of copy protected audio CDs in the United States; consumers wishing to place music off these CDs onto such devices as their iPod either have to “hack” the copy protection to format shift, or resort to illegal means of obtaining the copyrighted material – such as file sharing networks. In terms of compliance with copyright law, allowing consumers to legally format shift is by far the most desirable; by introducing DMCA-style law, the Australian Government will be forcing the hands of Australian consumers into full-scale piracy to exercise basic fair use rights. The situation seems most ironic when it is observed that consumers who purchase legitimately obtained copyrighted material with digital restrictions such as copy protected CDs are at a two-fold disadvantage to those who have pirated the material; those who pirate have obtained the material for a reduced rate (or possibly even obtained it for free), and the material they have obtained often contains no technological protection as it has already been removed to allow distribution. Piracy has always been a problem for copyright holders simply because consumers, when given the option, will choose to pay less rather than more for the same material; when the fact that pirated material is less restrictive and requires no illegal measures to allow fair use principles as format shifting, consumers are given yet another reason not to purchase legitimate copyrighted material.

Copyright holders, in their rush to secure increased rights for themselves, have failed to see that by shifting the balance of power so far in their favour that consumers are not only ignoring the newly created rules, but also the copyright holder’s previously existing rights. In the words of Elizabeth Stanton, to make laws that man cannot, and will not obey, serves only to bring all laws into contempt. By not allowing circumvention of technological protection for basic fair use rights, copyright law will not only be punishing legitimate consumers of copyrighted material, but also encouraging consumers to ignore existing laws and instead pirate copyright material.

The United States is itself beginning to realise that without balance, the laws they have created in favour of copyright holders will have the opposite effect to what was originally intended. The Digital Media

Consumer Rights Act (DMCRA)² seeks to modify the Digital Millennium Copyright Act in such a way to ensure that Fair Use takes precedence over technological protection. I strongly support such the adoption of such principles into Australian copyright law, and believe that the introduction of Chapter 17 of the Australia/US FTA without such provisions would remove all balance from the copyright system. By simply enacting a technological protection, all exceptions to copyright in favour of consumers would be removed. I would go so far as to suggest it would defeat the whole purpose of calling for this submission in the first place.

² [http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.1201:](http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.1201)

Conclusion

In summary, I would make the following recommendations to the persons or committee intending on modifying existing copyright law:

1. A fair use, or open-ended fair dealing provision, should be adopted by Australia to allow consumers of copyrighted material to use copyrighted material that they have licensed in any way they wish, so long as it does not substantially harm copyright holders.
2. In addition to this, the current fair dealing exceptions should be retained and additional exceptions should be made. This would create certainty for copyright holders and consumers of copyright legislation, and would allow the addition of specific exceptions that the issues papers raises.
3. The additional fair dealings exceptions that should be adopted include:
 - a. Allowing the time-shifting of all copyrighted material
 - b. Allowing the format-shifting of all copyrighted material
 - c. Allowing the content-shifting of all copyrighted material; in other words, shifting copyrighted material to the same format but arranged differently (e.g. creating a custom “mix tape”)
 - d. Allowing the backup of all copyrighted material
 - e. Allowing the use of all orphaned copyrighted material, once reasonable attempts had been made to contact the owner of the copyright, and these attempts had failed
 - f. Allowing the parody of all copyrighted material.
4. Finally, I would support that all these provisions take precedence over DMCA-style “technological protection circumvention prevention” laws, as adopted through the Australia/United States Free Trade Agreement. Should this not happen, any fair use changes made to copyright law would only serve to accelerate adoption of technological protection measures by copyright holders as the technological protection would take precedence over the fair use rights. This, in turn, would mean Australia would have adopted a United States-led strengthening of copyright law without any offsetting balance for Australian copyright users.