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Copyright Modernisation Consultation: ACCC response to the Consultation Paper

Overview

The ACCC welcomes the opportunity to contribute to the Copyright Modernisation Consultation being conducted by the Department of Communications and the Arts (the **Department**).

As the competition regulator, the ACCC has an important role to play in facilitating effective competition in all markets, including in markets where technological developments have the potential to bring significant improvements in existing, as well as entirely new, products and services. In the course of the ACCC's work, copyright issues arise from time to time, most recently in the course of the ACCC's digital platforms inquiry.

This is particularly true in creative industries, and media and communications markets, where digital technologies are providing new ways to develop products as well as to deliver them to Australian consumers by way of the digital economy.

Copyright laws should seek to balance the need to provide sufficient incentives for the creation of copyright works with the costs of restricting access to these works, which may affect their efficient use, including as inputs to subsequent innovation.

Achieving and maintaining this balance can be particularly challenging in rapidly changing markets. In the ACCC's view, this balance can only be achieved by way of flexible and effective copyright exceptions, as opposed to the current approach of narrowly defined prescribed purposes.

The remainder of this submission responds to the specific reform options proposed in the Department's Consultation Paper, dated March 2018. The ACCC would be happy to provide further detail on any of the issues raised in this submission and would be happy to respond to issues of interest to the Department.

Flexible copyright exceptions

The need for copyright exceptions to facilitate the socially beneficial use of creative works has long been recognised, with government providing exceptions for uses that have benefits to society but where the high transaction costs of entering into licensing are likely to reduce usage below socially desirable, or efficient, levels.

The rationale for these exceptions is to overcome the potential for an inefficiently low level of use of creative works, either generally across the economy, or by particular sectors such as education and disability support. In particular, copyright exceptions address the often high transaction costs of identifying the rights holders and negotiating licences over all of the works needed to develop and deliver the intended product or service.

The ACCC agrees that existing provisions in the *Copyright Act 1968 (Cth)* (**Copyright Act**) are unduly prescriptive and narrow, and are inhibiting the development of innovative products and services and competition based on digital technologies. Accordingly, the ACCC supports the introduction of flexible copyright exceptions in the Copyright Act.

The ACCC notes that the Department is consulting on two potential reform options to achieve this policy goal: the introduction of additional 'fair dealing' exceptions or a new 'fair use' exception. As previously explained in the ACCC's submission to the Productivity Commission's Inquiry into Intellectual Property Arrangements in Australia, the ACCC's preference is for a broad 'fair use' copyright exception.¹

The ACCC believes that such a 'fair use' exception would offer the best mechanism for providing appropriate access to copyright materials, in circumstances where there is a public benefit in providing such access, in a fast moving digital age. A 'fair use' exception would provide a desirable degree of flexibility to Australian copyright law to accommodate and foster technological advances and innovations that may otherwise be stifled or curtailed by the current prescriptive and/or narrow exceptions in the Copyright Act.

Instead of the inherently backwards looking task of examining whether an activity falls within a pre-existing category of allowable uses, a 'fair use' exception offers a clearer and more coherent test which is flexible, adaptable and technologically neutral, and hence overcomes the challenges presented in markets subject to rapid technological development.

A flexible rule does not necessarily mean an uncertain rule, the 'fair use' exception has been interpreted successfully in the US for decades. Nor does it facilitate uses of material that impact markets in which the rights holder itself exploits, or intends to exploit, the work.

Box 1: The Shazam conundrum

A 'fair use' exception promotes innovation by allowing transformative uses of copyright materials, such as data mining and cloud computing, which may have potentially large benefits and would better align with reasonable consumer expectations about uses of copyright material that do not harm, and may even benefit, right holders' interests.

Shazam is an online, automated, service which can identify a song from a short digital clip which is then matched to Shazam's own digital database. Once the song is identified the service enables the song to be purchased legally, for example through the i-Tunes or Google Play stores. In this way the service may actually increase sales of the original material. However, there is not a pre-existing category of exemption which would cover this use. This gap may potentially be holding back future Australian digital innovation making it simply too risky to be the 'Australian Shazam'.

¹ See the ACCC's submission, dated 15 November 2015, to the Productivity Commission Inquiry into Intellectual Property Arrangements in Australia

Fairness factors

The Department has proposed that five 'fairness factors' should be applied to assess whether or not a particular use of copyright material should be considered 'fair' in all the circumstances. These factors relate to:

- The purpose and character of the dealing;
- The nature of the work or adaptation;
- *The possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;*
- The effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- In a case where part only of the work or adaptation is reproduced, the amount and substantiality of the part copied in relation to the whole work or adaptation.

Four of these factors are well understood as they have been used to assess whether a use is a 'fair use' under the US doctrine for many years. On the other hand, the fifth factor (in italics above) has previously been applied in Australian copyright law only in respect of the research and study fair dealing exception, reflecting the complexities of interactions between copyright exceptions and statutory licensing schemes in the education sector.

It is difficult to understand how the fifth factor would apply in practice and the ACCC would be concerned to see this factor's reach extended beyond its current use in the research and study fair dealing exception into any broader copyright exception or any further fair dealing exceptions. This is consistent with the approach government has recently taken in not applying this fifth factor in the case of the disability access exception.

Importantly, the first four factors already protect the legitimate commercial interests of the copyright holder by applying a 'market value/effect' factor, which provides that if the effect of a use would be to undermine a market that the copyright holder should be able to exploit then the use would not be considered fair. Consequently, incorporating the proposed fifth factor, either as part of a general fair use exception, or to an expanded range of fair dealing exceptions, is unnecessary to protect these legitimate interests.

In addition, the incorporation of this additional fifth factor would clearly inhibit access to flexible copyright exceptions that would facilitate the development of new products and services and significantly promote competition and consumer welfare in the digital economy.

This is particularly pertinent to the development of products and services that rely upon access to a wide range of works across various repertoires, such as applications based on indexing caching and preparatory steps such as converting works into a digital format.

This is because inclusion of this factor would likely stifle investment by parties with the expertise and know how to develop these products and services. With the fifth factor, these investors would continue to face high transaction costs, as ongoing search and negotiation would still be required to ascertain the commercial terms of access to all the works relevant to the product innovation. Investors would also continue to face significant risk of infringement proceedings even where they initially took these steps, as a rights holder could still dispute ex post that an exception was or remains available. This is likely due to the uncertain nature of whether a commercial licence for the work was available 'at an ordinary commercial price', especially where markets for that use did not exist at the time of investment.

Including such a factor makes it riskier for anyone to attempt to develop a product reliant on the fair use of a large number of copyright materials. Even holders of significant numbers of

copyright rights may be reluctant to develop an index or cache or other novel use relying on wide access if they are concerned that other copyright holders will dispute the exception on this fairness factor.

In these circumstances, the incorporation of a fifth factor would clearly inhibit access to flexible copyright exceptions as intended without providing a corresponding benefit for the creation of works, and thereby risk achievement of the intended policy objective of achieving an appropriate balance in copyright protection.

Further, restricting access to flexible copyright exceptions would pose significant risk given the existence of jurisdictions with more flexible copyright arrangements and the highly mobile nature of the underlying capital. Principally these entail businesses leaving Australia and taking with them the knowhow that would have otherwise fostered local industries. Even if the enforcement of the existing copyright protections against new applications is not currently prevalent, the potential for this to occur also calls into question access by Australian consumers to innovations and new applications developed in other jurisdictions.

Box 2: More barriers to the 'Australian Shazam'

Shazam relies on being able to access all digital songs for data matching purposes. It would simply not be possible for Shazam to obtain a licence for each song. However, licences will exist for certain songs. The adoption of the proposed fifth 'fairness factor' would again cast doubt on whether an 'Australian Shazam' would evolve in such an uncertain copyright climate.

Contracting out of copyright exceptions

The ACCC supports parties being restricted from contracting out of the copyright exceptions in the Copyright Act that have been introduced on public policy grounds by the inclusion of a rule preventing this in the Copyright Act. In addition, if adopted, a 'fair use' exception would reflect a cost-benefit framework for copyright protection by balancing conflicting interests. Contracting out of such arrangements is more likely to be detrimental rather than beneficial to the copyright user, particularly where there is an imbalance in bargaining power between rights holders and users.

The ACCC notes the Department's observation, in the Consultation Paper, that existing provisions, involving abuse of market power in Part IV of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) and unfair contract terms the Australian Consumer Law (**ACL**), may partially address the contracting out issue.

The ACCC is responsible for enforcing the relevant CCA and ACL provisions. In the ACCC's view, these provisions should not be considered a suitable alternative to the inclusion of a specific restriction on contracting out in the Copyright Act. In particular:

- *The Part IV CCA and ACL provisions are not sufficiently extensive.* Seeking to impose or give effect to contractual provisions which cover a licensee's use for which an exception is available, would only be anti-competitive or unfair in certain circumstances;
- *Enforcing the Part IV CCA and ACL provisions would be less certain.* The unequal bargaining position between the parties would likely limit the practical value of recourse to expensive, time-consuming and uncertain litigation to establish a breach of the CCA or ACL in these circumstances.